

# THE CONVEYANCER

## AND

## PROPERTY LAWYER

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### CONVEYANCER'S NOTEBOOK.

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*Acquisition of land (owner-occupier) regulations.* — We had occasion in our last number to call attention to these complicated provisions. It may comfort some of our readers to know that in the House of Commons (on a prayer for annulment) the Attorney-General said (Hansard 144, p. 1915): "I only wish that there had been an explanatory memorandum attached to these Regulations. I confess that it would have saved me from burning a certain amount of midnight oil last night. Let me say that I am not at all surprised to see that a prayer has been put down to annul these Regulations because, at first sight, they do appear to be extremely complicated and difficult to understand. . . ." It may be further comfort to know that: "All the interested Departments—the Charity Commissioners, the Public Trustee, high legal and judicial authorities—were consulted . . ." and that the Regulations were the "child" (perhaps children) of the lawyers, "born after a very lengthy gestatory period". All of which, to us, makes their form and content the more remarkable. We had thought that in a manner of speaking all Acts of Parliament were children of lawyers, but there seem some constitutional problems in asking judicial advice on a matter to be promulgated by any department. It rather savours of the practice of consulting the Judges prior to action taken which was abandoned after the prerogative rule of the Stewarts. The learned Attorney-General's faith that the meaning of "settled land" is understood in the Courts also appears to us to be touching. The fact remains that these Regulations are not apparently expected to be understood except by lawyers, so perhaps the lawyers should not grumble.

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*Selling price of houses.*—Though we do not usually comment upon matters that have not become law the Inter-Departmental Committee's Report on the Selling Price of Houses (Cmd. 6670, price 6d.) contains such far-reaching and important proposals that it should not be ignored. The Report is not concerned with desirability but practicability, and notwithstanding contrary advice tendered by professional

bodies, the Report states that it is practicable *provided* that the Valuation Office can have sufficient staff to carry out the work.

Quite apart from the proposals for control the Report contains some very interesting facts. The range of rise in price is undoubtedly staggering and can only be regarded as uneconomic at a time when the country is poorer than it has been for centuries. So, a £700 house was sold at a percentage increase on the pre-war price of 578.6 and the sale took place prior to March, 1945. We think that prices have shown a tendency to increase. The tables showing the growth of average percentage increases from March, 1943, to March, 1945, in different districts is still more interesting. In March, 1945, the average percentage increase for London was 60 per cent. and that notwithstanding the imminent peril of V weapons. In the Midlands it was 105 per cent. and in Wales 126 per cent. In March, 1943, London had an average increase of 18 per cent., the Midlands 46 per cent., and Wales 48 per cent. Where the houses were sold without vacant possession there is no comparable increase. In 1945 London was 47 per cent., the Midlands 23 per cent., and Wales 43 per cent., whereas in 1943 it was respectively 4 per cent., 15 per cent., and 14 per cent., and these figures, for reasons specified in the Report, are probably unjustifiably high.

The proposal that is recommended (others are considered) is that the vendor should be compelled to get a selling price fixed by the district valuer based upon the value as at March 31, 1939. Of course, allowance is made for improvements after that date and a percentage increase on the value as at that date. Furthermore, it is not proposed to deal with houses not sold with vacant possession. We think that this may give rise to some speculation in the hope that by death or other means the tenant may be got rid of. The pricing of leaseholds is also specially considered.

Where the house has already been acquired after the rise in prices the owner is to have the option of the price paid or the valuer's certificate.

The procedure is set out with some care. When the purchase is completed the vendor is to supply both the valuer's certificate and a statutory declaration which must be handed over on stamping the conveyance. Similarly there is provision made for collateral transactions such as the sale of fixtures, fittings or furniture or mortgage transactions. The maximum permitted price would require a definition of price to include fixtures and fittings normally passing but excluding tenants' fixtures and fittings. The Report also contemplates valuation where the sale is for a consideration other than cash.

Another interesting suggestion is that "sale" should be so defined to include any transaction within the suggested period, namely, five years, whereby conveyance might take place outside the period. Likewise a mortgagee should not be able by foreclosure or otherwise to acquire the property in respect of a loan for a sum in excess of the permitted maximum until after all sums in excess of that maximum had already been repaid.

These notes do not exhaust the Report but give some indication of the care and foresight exercised by its framers. They say: "While it must certainly be recognised that in a seller's market there may be

many temptations or tendencies to pay more than the controlled prices, and while some undetected evasions will undoubtedly take place, we do not consider that they would be on such a scale as to make the scheme we suggest impracticable or for this reason unwarranted". Nevertheless we do think that if the scheme is imposed it is desirable that it should operate as fairly between sellers and purchasers as possible and that the profession should consider it with a view to suggesting any further loopholes that may have escaped the framers of the Report.

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*Compulsory acquisition of war-damaged land.*—Rules have now been made (S. R. & O., 1945, No. 1216/L.19) for dealing with the assessment of compensation of land compulsorily acquired after war damage. These rules are made under the Town and Country Planning Act, 1944, and deal with cases falling within section 57 of the Act. These rules are complicated and highly technical. The issues involved arise either where since war damage has occurred the property has been made as beneficially valuable as before or if it is not claimed that the land has been made as beneficially valuable then if any material difference has been made since the date of war damage and before the notice to treat or between incumbrances during that period: rule 3. These issues are to be determined under these rules through the machinery of the War Damage Commission. The relevant period in which a claim is to be made is twenty-eight days from the notice to treat, but the Commission has power to extend the time: rule 4. The procedure for determination is to require written representations, followed, if *the Commission consider it desirable*, by an inquiry held by a person appointed by the Commission: rule 5. At any inquiry only one expert witness for each party is to be called unless the person holding the inquiry otherwise directs. But generally speaking the Commission can control its own procedure. On a question of law appeal lies to a Judge of the High Court for the time being nominated by the Lord Chancellor for the purposes of the War Damage Act, 1943. There are consequential provisions arising out of this procedure, including reference of a material difference to an arbitrator for valuation: rule 7.

The same rules also provide for the method of assessment of after-damage value where there are a variety of interests in the same land, therein improperly called a hereditament. Here, again, there is procedure, if the parties cannot agree concerning the respective proportions of the various interests, for submitting the matter to arbitration for determining the value: rule 15, but only after a hearing before the valuation officer: rule 13. This is preceded by an estimate given by the parties and setting out certain facts as prescribed in rule 12 (1) (d).

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*Planning forms.*—Under S. R. & O., 1945/1036, the Minister of Town and Country Planning has issued a series of forms to be used in connection with the powers and duties of the Local Planning or

Highway Authority. These rules have one bright spot provided by rule 4. This rule sets out the manner felt necessary by the Department to call the recipient's attention to any notice sent by the authority. At the beginning of such notice or document there shall be "clearly and legibly" inscribed:

**IMPORTANT.—This communication affects  
YOUR PROPERTY.**

The rule does not determine what effect, if any, is caused by the omission of such a heading. Presumably the Department is of opinion that the citizen has ceased to take notices from Government Departments or local authorities seriously enough even to look at them. Any reference is to be to a map of not less than twenty-five inches to the mile. There are nineteen forms which all appear to be forms drawn up by or at the instance of the local authority or statutory undertaker.

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*Planning—General Transitional Amendment Order.*—This Order (1945/1304) extends the time for varying periods of the times limited in the Town and Country Planning (General Transitional) Order, 1933. The 1933 Order deals with schemes that had been begun before the 1932 Act.

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*Planning—interim development.*—There have been a series of Orders: 1945/1264—1269, which provide for the union of certain areas for the purposes of authorities with power to permit development; 1945/1264—1267 all provide for the "Downland area" and require the consent of the county council as well as the district council; 1945/1268 deals with the appropriate authority in the districts within the urban district of Spalding and the rural district of Boston, East Elloe and Spalding. 1945/1209 deals with the same question for the councils of the Boroughs of Beaumaris, Amlwch, Holyhead, Llangefni, Menai Bridge, Arthery, Twrcelyn, and Valley.

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*Blitzed houses and the Rent Acts.*—In our contemporary the *Law Journal* (Vol. 95, p. 273), a contributor raised an important question that seems to have been overlooked by our planners. If a house with a controlled rent was knocked down by enemy action could a tenant claim to occupy it if the landlord rebuilt it? As the learned writer points out, there can be little incentive for a landlord who has received a "value" payment to rebuild a house at considerable expense to himself, if he cannot let it except to the same tenant at the same rent. He also points out that there is a difference, that may be material, between houses controlled prior to the 1939 Act. Under the old Acts it might be argued that the new house was a house built after April 2, 1919. Under the 1939 Act there is no such provision, but the learned writer suggests that on the principle of *Mann v. Merrill*, [1945]

1 A. E. R. 708, the changed circumstances since the original letting can be taken into account, and the Court would hold the new house not controlled.

We hardly like to express any opinion on this legislation, most of which seems to us to cut across all known principles of real property law, but it does appear to lose sight of the true character of tenancies of land. The tenancy is primarily in the soil and not in the bricks and mortar which may have been blown down. If fresh bricks and mortar are put up then we should have said that *on principle* the tenant should be entitled to his tenancy. Against this no doubt there is the argument that control only applies to tenancies of land with buildings upon it, and that once the building is demolished then control ceases and having ceased it does not reattach on the same terms. This may be true, and if it is it emphasises our point that planning legislation rarely fits with property law. In any event the matter calls for explicit legislation.

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We have received the following practice notes from the Senior Registrar of the Probate, Divorce and Admiralty Division:—

(1) *Custody of Legitimated Children.*

Either party to a marriage may claim custody of a child which has been legitimated by virtue of section 1 of the Legitimacy Act, 1926.

In a petition the legitimated child should not be described as issue of the marriage, but there should be a separate paragraph setting out the name and date of birth of the child and the fact that such child has been legitimated by the operation of section 1 of the Legitimacy Act, 1926.

The Directions of May 19, 1927, January 21, 1929, and June 7, 1929, are cancelled.

(2) *Answer of Co-respondent who wishes to be heard as to Damages only.*

Where a co-respondent wishes to be heard as to damages only, his answer should not be a denial of the adultery alleged but a statement that he does not admit that the petitioner has suffered damage to the extent claimed (or at all).

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## DEEDS OF DISCHARGE OF TRUSTEES.

By H. M. BOUGHTON, of Lincoln's Inn, Barrister-at-Law.

One of the main objects of the framers of the S. L. A. (a) was to hide the equitable interests and dealings therewith behind a curtain, and this has caused a multiplication of documents. Formerly the settlement consisted of one deed, and when the tenant for life died his

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(a) In this article "S. L. A." means Settled Land Act, 1925; and "W. & C." Wolstenholme and Cherry's Conveyancing Statutes, 12th ed.

successor simply took possession. Now by section 4 of the S. L. A. there must (as a rule) be a vesting instrument and a trust instrument to constitute a settlement of a legal estate in land. By section 35, on the appointment of new trustees of a real property settlement, there have to be also a deed of declaration as to who are the trustees, and a memorandum endorsed on the last or only principal vesting instrument. On the death of a tenant for life his personal representatives hold the settled land in trust to convey it to or assent to its vesting in his successor (sections 7 and 8). Then, a tenant for life cannot exercise his S. L. A. powers until the vesting instrument is made (section 13). In *Re Alefounder's Will Trusts*, [1927] 1 Ch. 360, A became on January 1, 1926, estate owner holding the legal fee simple in trust for himself as equitable tenant in tail, with remainders over. Mr. Justice Astbury held that if he barred the entail he would be an absolute owner and could dispose of the property without obtaining a vesting deed or assent. "It is difficult to see", said the learned Judge, "how any vesting deed containing the particulars required by section 5 could possibly be drawn after the cesser of the settlement." If, on the death of A, the tenant for life under a settlement, B becomes tenant in tail in possession, as the property continues to be settled after A's death, the S. L. A. trustees, as special executors of A, would prove his will as to the settled property (Administration of Estates Act, 1925, s. 22; *Re Bridgett and Hayes*, [1928] Ch. 163). But if B disentails after A's death, the trustees can vest the property in him absolutely by an ordinary assent, and he can deal with it as absolute owner without a vesting instrument.

One of the most mysterious provisions of the S. L. A. is that contained in section 17 which provides that "where the estate owner of any settled land holds the land free from all equitable interests and powers under a trust instrument, the persons who in the last or only principal vesting instrument or the last or only endorsement on or annex thereto are declared to be the trustees of the settlement or the survivors of them shall, save as hereinafter mentioned, be bound to execute, at the cost of the trust estate, a deed declaring that they are discharged from the trust so far as regards that land". According to W. & C., p. 980, this section only applies where a vesting instrument has been made, and the settlement determines during the lifetime of the trustee estate owner. If that section had stood alone, there might not have been so much room for controversy, but by the S. L. A., s. 110 (5), "If a conveyance of or an assent relating to land formerly subject to a vesting instrument does not state who are the trustees of the settlement for the purposes of this Act, a purchaser of a legal estate shall be bound and entitled to act on the assumption that the person in whom the land was thereby vested was entitled to the land free from all limitations, powers, and charges taking effect under that settlement, absolutely and beneficially, or, if so expressed in the conveyance or assent, as personal representative, or trustee for sale or otherwise, and that every statement of fact in such conveyance or assent is correct". It will be observed that that last sub-section is a protection to purchasers, whereas section 17 is rather dealing with the requirements of the owner. In W. & C. at p. 981, it is stated that section 17 "does not apply where the land is vested in personal representatives, and they

are under an obligation (section 7 (5) *sup*) to make an assent to an absolute owner without nominating S. L. A. trustees (section 110 (5), *inf*) . . . for the representatives never held the land as settled land”.

If those last words are correct, the statement would not apply to the case we have suggested, as they would have held the land as settled land before B disentailed. As the purchaser is bound to assume that B is entitled absolutely and beneficially to the property, he cannot compel B to obtain a discharge from the trustees. It certainly seems reasonable to assume that the settlement has come to an end when the land is vested in B absolutely and beneficially by an assent on behalf of the former trustees, as special executors. A note in W. & C., p. 1175, states that section 110 (5) takes the place of section 17 “where the settlement determines on the death of the trustee estate owner”. That may have been the main object of the sub-section, but there is no reason to limit it in that manner.

To find a use for section 17 we can imagine in our suggested case that a vesting instrument was executed in favour of B before he disentailed. Then, when he did disentail, unless the trustees executed a deed of discharge, a purchaser from him would insist on paying the purchase money to the trustees, as without diving into the equitable title, which he ought not to have to do, he could not tell that B had become absolute owner.

The deed of discharge gives him the necessary information and shows him that he is safe in paying the purchase money to B. By sub-section (2) of section 36 of the Administration of Estates Act, 1925, “unless a contrary intention appears, the assent shall relate back to the death of the deceased”. No intention that the assent shall or shall not relate back to the death of the deceased commonly “appears” in the assent. The form given in the Fifth Schedule to the Law of Property Act, 1925, provides for the assent vesting the property in the assentee “for all the estate or interest of the said X Y at the time of his death [*or, for an estate in fee simple*]”. In our suggested case the question whether the assent related back to the death of the tenant for life is merely academic, as, whether it did or not, B was entitled to the rents and profits of the property from that death and had the legal estate when he sold it. But there might be difficulties in theory at all events. Supposing, for instance, that the equitable owner, whom we will call A, sells his equitable interest to B, who in turn sells it to C, and the assent is made by the personal representatives in favour of C in fee simple, it cannot surely give C the fee simple from the death of the tenant for life, as he did not *ex hypothesi* acquire it for some time after, but a contrary intention does not “appear” in the assent. Probably, if ever this point came before the Court, it would give a wide meaning to the word “appear”. At any rate there would appear to be no need of a deed of discharge when the assent was made in favour of C.

The following note is to be found in *Key & Elphinstone's Precedents*, 14th ed., Vol. 2, pp. 786-7: “Great care should be taken that all the deeds requisite to bring the settlement to an end are executed and completed before this deed is executed, otherwise the trustees might possibly incur considerable personal liability. . . . For instance, if a tenant in tail is about to bar his estate to a fee simple, the deed of discharge

should not be executed till production of the deed of disentail". It would obviously be a breach of trust for trustees to declare that they are discharged from the trusts created by the settlement, when the settlement is still in force. The strange thing about the discharge of the trustees from the trust is that though they hold capital money in trust, they do not, as trustees, hold the land in trust. If there is a discharge deed it should be executed after the assent, as "estate owner" in the Settled Land Act means, "the owner of a legal estate" (section 117 (1) (xi)), and the commencing words of section 17 (*supra*) are, "where the estate owner of any settled land holds the land free", etc. The assentee has not got the legal estate before the assent.

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## SALES OF LANDS OF MIXED CHARITIES.

By A. H. WITHERS, of Lincoln's Inn, Barrister-at-Law.

When a charity proposes to sell or mortgage its land, the title to which is not registered under the Land Registration Act, 1925, its legal advisers frequently claim that the charity is a "mixed charity" and that the land is, under the provisions of section 62 of the Charitable Trusts Act, 1853, relating to mixed charities, exempt from the jurisdiction of the Charity Commissioners (or Board of Education) so that no consent to the sale or mortgage is required under section 29 of the Charitable Trusts Act, 1855.

The object of this article is to consider what facts have to be proved to establish such claims to exemption. This consideration necessitates the raising of various important questions which have not yet been elucidated by the Courts, and affords the writer an opportunity of suggesting answers to them.

Before considering how section 62 of the Charitable Trusts Act, 1853, operates, one has to consider what section 62 and section 66 say. To clear the way for the consideration of the sections, the following definitions should be borne in mind.

"*Endowment*", as defined in section 66, simply means "property" whatever be the trusts affecting it (*a*). The old theory, that it meant property the capital of which could not be used for general income purposes, was held to be unfounded by the Court of Appeal in *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145. If "endowment" meant permanent capital, charities able to use the capital of *all* their property as income would not be mixed charities.

"*Mixed charities*" is not a term used in the Act. It is a convenient term used by lawyers to denote a charity described in section 62 as "maintained partly by voluntary subscriptions and partly by income arising from any endowment", "endowment" here meaning "property".

A convenient way of ascertaining what the Act says is to study and compare the two following columns.

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(a) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 151, and *Re Orphan Working School, etc.*, [1912] 2 Ch. 167, at p. 176.

## Text of the Act.

## § 66.

The expression "endowment" shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, monies, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof.

## § 62.

Where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof;

and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said Board, or the powers or provisions of this Act;

and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity,

or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act.

## Text of the Act recast in simpler form.

## § 66.

The expression "endowment" means property.

## § 62.

Where a charity is a mixed charity, *i.e.*, "maintained partly by voluntary subscriptions and partly by income arising from any property" this Act shall not apply to:

(1) Voluntary subscriptions and the application thereof,

or

(2) Any donation or bequest to a mixed charity "of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions",

or

(3) Any portion of any property (coming under (1) or (2)) which may be "set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity",

or

(4) Any donation or bequest "in aid of any fund so set apart or appropriated for any such object or purpose" as is set out in (3).

The right-hand column omits reference to the words "the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only", which appear early in section 62. Since 1893 it has been assumed that these words do not exclude capital of property from the jurisdiction, and that they in fact exclude nothing (b). With this exception, the right-hand column includes the whole of section 62, less some verbiage.

The following points have been decided on section 62.

"Voluntary subscriptions" means recurring gifts repeated annually or otherwise with more or less regularity (c). The exemption afforded by section 62 to any property extends to the property from time to time representing the same (d). And for a "donation or bequest" to a charity to be exempt from the jurisdiction, the charity must be "mixed" at the date of the donation or bequest (e).

The whole matter may be summarised thus: A charity, claiming for its land exemption under the provisions of section 62 relating to mixed charities, has to prove not only that it is a "mixed charity" but also that the land in question is or represents property unconditionally given to it, and that the gift either was received in the form of "voluntary subscriptions" or was made to the charity at a time when it was a mixed charity. So stated, the general rule is fairly clear. The trouble arises on the application thereof to circumstances that are not uncommon.

Where under such general rule a charity claims that its unregistered land is free from the jurisdiction, it has to prove or establish the facts set out in paragraphs I to V below.

In this article the expression "the jurisdiction" means the jurisdiction of the Charity Commissioners (or Board of Education) under the Charitable Trusts Acts, exemption from which is claimed under section 62 of the Act of 1853.

*I. It has to be shewn what precisely is the Charity to whom the Land belongs.*

Usually there is not the slightest doubt about the matter. But if property has been given to a charity to found or benefit a subsidiary trust, then in connection with such property the charity is, or at any rate may be, the subsidiary trust and not the parent charity. Examples of this are gifts creating or increasing a fund, the income of which is held on trust to provide or increase a scholarship at a school or the salary of an official of the parent charity.

There are some cases in which it is difficult to tell from the provisions of the deed of gift or purchase whether (1) the property is to be held on trust for the then existing charity, or (2) a subsidiary

(b) It is suggested in Tudor on Charities, 5th ed., p. 545, that the word "only" is used, not for the purpose of distinguishing income from capital, but for the purpose of distinguishing income derived from an endowment from income derived from subscriptions. If the words in s. 62 were intended to exclude capital of all property from the jurisdiction, s. 62 would surely have said so, and the later parts of s. 62 would have been worded very differently. The only importance of s. 62 is in its exemptions and exclusions. The rest of the Act effects all the extensions and applications required.

(c) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 151.

(d) *Ibid.*, at p. 153-4.

(e) *Re Child Villiers' Application*, [1922] 1 Ch. 394.

charity (local or special) is being started. In such cases, which are often cases of places of religious worship held on the trusts of one of the Wesleyan Methodist Church Model Trust Deeds or on trusts framed on similar lines, the deeds have to be very carefully scrutinised. The deeds usually provide for the erection and user of a church, etc., in a particular locality and, when this becomes impossible or inadvisable in that locality, for the sale of the property and the user of the proceeds for the benefit of other localities. It is sometimes claimed that the trust is for the benefit of the religious body (the main charity) as a whole. But if the trust had *ab initio* been that of the general trusts of the main charity, it would have been useless and improper to introduce any special trust for any particular locality, and it would have been quite sufficient for the conveyance to declare that the grantees hold the property upon trust for the main charity and to dispose thereof in such manner as the governors of the main charity may from time to time direct. Moreover, careful scrutiny of the deed will usually show that the proceeds of sale of the property cannot (on the terms of the trust deed) be used in any case for *all* the general purposes of the main charity, *e.g.*, to pay the general expenses of the administration of the main charity (f). In such cases, the deeds seem to create or declare subsidiary trusts, distinct from the trusts of the main charity (g).

But assuming it is found that the trusts are (1) for user as a church or school, etc., in a particular locality, and (2) (if and when the property is not needed for such purpose in such locality) for the sale thereof and the user of the proceeds for *all* the general purposes of the main charity. Then it does become a question whether the trusts on which the property are held are those of a local charity or those of the main charity. It is submitted that in most of such cases the property is held (i) temporarily and primarily on a local or special trust (which is separate and distinct from that of the main charity), and (ii) when that local or special trust fails, then upon the general trusts of the main charity. Where this view is correct, it may be a material question which of the trusts affect the property at any particular date.

In the case of the deeds of gift or purchase above referred to, a claim that the property belongs to the main charity may, if correct, result in the property being subject to the jurisdiction owing to the provisions of section 62 as to "special application or appropriation" which are dealt with in paragraph IV of this article.

## II. *It has to be proved that the land constitutes or represents one or more gifts to the charity.*

In this paragraph the expression "gift" includes "voluntary subscriptions" and other donations and bequests. It does not include

(f) *E.g.*, see s. 26 of the Model Deed for the Methodist Church dated December 15, 1932, and s. 36 of the Wesleyan Methodist Chapel Model Deed of 1892, which have to be compared with the far wider earlier provisions in each deed as to the application of surplus income. Joyce, J., must have missed this point in *Re Wesleyan Methodist Chapel in South Street, Wandsworth*, [1909] 1 Ch. 454.

(g) This was the view of Stirling, J., in *Re St. John Street Wesleyan Methodist Chapel*, [1893] 2 Ch. 618, at pp. 634-5. In *Re Hoghton Chapel* (1854), 2 W. R. 631, Wood, V.-C., was inclined to take the wider view.

other receipts, such as Government grants and fees received for services rendered by the charity (*gg*). Receipts from concerts and other entertainments, at any rate if organised by the charity, are hardly gifts.

Land is not acquired by way of gift if it is purchased solely in consideration of a rentcharge reserved out of the property.

If the charity buys land wholly out of borrowed moneys, *e.g.*, out of an overdraft allowed by the bank—the land has not been acquired by the charity under any gift, although the debt may be subsequently paid off out of gifts (*h*).

Where property is purchased by a charity under a valid contract, questions arise on which there is no authority. Here it seems necessary to go back to the contract for purchase, for the contract makes the charity the owner of the land, subject to the vendor's lien for unpaid purchase money (*i*).

If the charity enters into a valid contract to buy land and pays no deposit, it has (it is submitted) purchased the land on its personal credit and not out of any gift. So, too, if it pays the deposit out of borrowed moneys. But if it pays the deposit out of moneys free from the jurisdiction, the land appears to be exempt from the jurisdiction, however the rest of the purchase money may be paid. It is submitted that the source of the moneys applied in payment off of the purchase money (less the deposit if any) does not alter the situation created by the contract, so far as regards the jurisdiction. Such cases would seem to be fairly clear if the vendor did not require immediate payment of the unpaid purchase money and left such debt on mortgage of the land, and the change of his lien into a legal or formal mortgage seems to be immaterial.

If a charity has land which is free from the jurisdiction but is subject to a mortgage and that mortgage is discharged wholly or partly out of moneys subject to the jurisdiction, it is submitted that the land remains free from the jurisdiction. The writer submits that the discharge of the mortgage out of moneys subject to the jurisdiction does not require the mortgage to be in equity kept on foot so as to enable the jurisdiction to be kept on foot to the extent of the mortgage money.

The writer also suggests that the fact that moneys have been expended in repairing, improving or erecting buildings on land of the charity, or otherwise in improving such land, cannot affect the question whether the land is or is not subject to the jurisdiction. The money spent appears to disappear in the land. It seems impossible for land to be brought under or out of the jurisdiction by the expenditure thereon of moneys (whether a few pounds or large sums) subject to or free from the jurisdiction.

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(*gg*) See *Re Stockport, etc., Schools*, [1898] 2 Ch. 687, at p. 697, and *Re Society for Training Teachers, etc.*, [1907] 2 Ch. 486, at p. 494.

(*h*) *Re Charles Harding and the Trustees of the Welsh Calvinist Methodist Con-  
nexion* (1905), 92 L. T. 641. But Swinfen Eady, J., seems to have decided in *Re Parry  
& Horton's Contract* (1903), 49 Sol. J. 500, that payment off of borrowed moneys out  
of voluntary subscriptions caused the property, purchased out of such moneys, to be  
acquired by gift.

(*i*) See Williams on Vendor and Purchaser, 4th ed., p. 545-6.

III. *It has to be proved that the charity is a "mixed charity" and that each material gift was either a "voluntary subscription" or was a gift (other than a "voluntary subscription") made to the charity at a time when it was a "mixed charity".*

As before stated, "voluntary subscriptions" mean recurring gifts repeated annually or otherwise with more or less regularity (*j*).

The term "mixed charity" is applied by lawyers to a charity which in section 62 of the Charitable Trusts Act, 1853, is referred to as *maintained* (1) partly by "voluntary subscriptions", and (2) partly by the income of any "endowment", *i.e.*, of any property whatsoever, whatever may be the trusts affecting the property and whether or not the capital of the property is applicable as income (*k*).

Income here does not include the user or occupation of property for the purposes of the charity (*l*).

The fact that the charity may have other sources of income seems to be immaterial, but the point has not been definitely decided (*m*).

The exact meaning of the word "maintained" is not clear, but it is submitted that it only applies where the charity is a going concern and its expenses are being paid (partly at any rate) out of voluntary subscriptions and income of property.

Assume that it is intended to start a charity—*e.g.*, a church. Money comes in well. Supporters provide periodical subscriptions, and the promoters of the charity have a few thousands of pounds at a bank, producing interest, and postpone buying or building a church until more funds are available. The charity has voluntary subscriptions and income of property, but it is not, it is submitted, "maintained" thereby and therefore is not at this stage a mixed charity. Until the church is built or bought and services are held thereat, the charity seems not to be "maintained" at all.

"Voluntary subscriptions" held by a mixed charity and received by it before it became "mixed" appear to be free from the jurisdiction.

For a gift (not being a voluntary subscription) to be exempt from the jurisdiction, the charity must be a "mixed charity" at the time of the gift (*n*).

Thus, gifts founding a charity, or made (otherwise than in the form of "voluntary subscriptions") to a charity before it became mixed or during a period whilst it was not mixed, are not exempt, although the capital thereof may be applicable as income, nor are accumulations of the income of such gifts exempt.

If a charity whilst "mixed" obtains property free from the jurisdiction and ceases to be mixed, it is submitted that property representing donations and bequests remain free from the jurisdiction, but that property representing voluntary subscriptions (except so far as specially appropriated by the governors) becomes subject to the

(*j*) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 151.

(*k*) *Ibid.* and *Re Orphan Working School, etc.*, [1912] 2 Ch. 167, at p. 176.

(*l*) *Re Stockport, etc., Schools*, [1898] 2 Ch. 687, at p. 697, and *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, at p. 394.

(*m*) The point was raised by Lindley, M.R., in *Re Stockport, etc., Schools*, [1898] 2 Ch. 687, at p. 697, and was assumed by the Court of Appeal in *Re Church Army* (1906), 94 L. T. 559, where the facts are stated at p. 561.

(*n*) *Re Child Villiers' Application*, [1922] 1 Ch. 394, and *Re Shakespeare Memorial Trust*, [1923] 2 Ch. 398.

jurisdiction so long as the charity is not mixed. But the point has not been considered in any reported case.

IV. *It has to be proved that each material gift (not being a voluntary subscription) was made without condition by the donor.*

To be exempt the donation or bequest must be of property "of which no special application or appropriation shall be declared by the donor or testator and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions". This special provision does not apply to "voluntary subscriptions", and it only applies to donations or bequests, other than recurrent voluntary subscriptions. But "voluntary subscriptions" would seem almost invariably to be given for general purposes and to be applicable as income.

*No special application or appropriation.*

A gift to a charity for a particular purpose—*e.g.*, to repair the steeple of a church—cannot be used for another purpose of the charity—*e.g.*, to provide a new organ in the church. And if the particular purpose fails *ab initio*, the gift has usually to be returned to the donor (*o*).

It is submitted that when a charity or its supporters issue an appeal for donations for a particular purpose of any sort, gifts in answer to such appeal are almost invariably gifts of which a special application or appropriation has been indicated by the donors, and are certainly not moneys which may legally be applied by the governors as income for other general purposes of the charity—at any rate so long as the particular purpose has not failed.

This view seems to coincide with the view expressed by Stirling, J., in *Re St. John Street Wesleyan Methodist Chapel, Chester*, [1893] 2 Ch. 618, at p. 636, and by Cozens-Hardy, M.R., in *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, at p. 395.

In *Re Church Army* (1906), 94 L. T. 559, where the charity issued appeals for various objects and subscribers stated to what objects they were subscribing, the Court of Appeal held that each subscriber intended his subscription to be dealt with as a subscription for the general purposes of the charity, though especially allocated in particular to one of them. The Court did not directly deal with the question of "special application or appropriation" and decided that the subscriptions were free from the jurisdiction on the ground that they were applicable as income.

In the case of *Re Orphan Working School and Alexandra Orphanage's Contract*, [1912] 2 Ch. 167, land was purchased out of subscriptions for that purpose and ordinary subscriptions and was conveyed to the charity for its general purposes. It was held that, especially having regard to the trusts of the conveyance and the

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(o) *Re University of London Medical Science Institute Fund*, [1909] 2 Ch. 1. This is impossible in the case of proceeds resulting from concerts and other entertainments and from collections in streets and at churches—see *Re Welsh Hospital (Netley) Fund*, [1921] 1 Ch. 651, at p. 660, and *Re Society for Training Teachers of the Deaf and Whittle's Contract*, [1907] 2 Ch. 486, at p. 494. The fact that the money is not returned does not seem to free it from the jurisdiction.

decision in *Re Church Army*, the subscriptions were not appropriated by the donors on any special trust—see p. 181.

The correctness of the two decisions last above referred to appears to the writer to be very questionable. To be within the exemption the gift has not only to be applicable for general purposes but has also to be made without “special application or appropriation”. The two decisions in question concentrate on “applicable for general purposes” and practically ignore the other part of the statutory provision. Suppose a donor gives money to a mixed charity upon trust (declared by deed) to buy additional land to be conveyed to the charity upon trust that the income and (in case of a sale) the proceeds of sale thereof may be used as income for the general purposes of the charity. It is submitted as clear that the money and the land purchased thereout are not within the exception and are subject to the jurisdiction.

It has been held that a legacy “to the trustees of an endowment fund of” a hospital (*p*) or to a hospital “to found a bed there to be called the Eleanor bed” (*q*) is not applicable as income. In each case a “special application or appropriation” seems to be declared, though this was not the ground for the decisions.

Gifts for a particular purpose may be to found or benefit a subsidiary charity—see paragraph (I) above.

Gifts for the express purpose of paying off or reducing mortgage or other debts (special or general) do not seem to create any difficulty. They disappear when applied in the reduction or extinction of the debts in question.

Gifts for the express purpose of acquiring land and land acquired thereout seem certainly to be subject to the jurisdiction.

Gifts may be made for the express purpose of improving lands which belong to the charity and are free from the jurisdiction, *e.g.*, by erecting or improving buildings. It is submitted that moneys spent in improving land or buildings are merged and disappear in the land, and that the exemption of the lands improved is not affected by the application thereon of moneys which were subject to the jurisdiction.

#### *Applicable as income.*

The words “and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions” seem to have little point having regard to the prior provision as to no “special application or appropriation”. They appear merely to keep within the jurisdiction absolute gifts to the charity on terms (express or implied) that capital is to be kept intact and that income only is to be used for the general purposes of the charity (*r*). Such gifts would hardly be gifts of which a “special application or appropriation shall be declared”.

If a charity were prohibited by its constitution from using ordinary “donations or bequests” as income, it may be that the words above quoted would keep the donation or bequest within the jurisdiction. But it is hardly likely that any charity is subject to such a prohibition.

(*p*) *Re Corbett*, [1903] 2 Ch. 326.

(*q*) *Att.-Gen. v. Belgrave Hospital*, [1910] 1 Ch. 73.

(*r*) See *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at the foot of p. 151 and at p. 154.

The case of a charity appropriating to capital property which it can use as income is dealt with in paragraph V.

Property may be given to a mixed charity upon special trusts and, when those fail or determine, for the general purposes of the charity. So long as the *special* trusts continue, it seems to the writer to be immaterial that in the future the property can be sold and the proceeds applied for the *general* purposes of the charity. And even after the special trusts determine, it seems to the writer to be very doubtful whether the words last above quoted apply, for they seem to apply only to the date and terms of the gift (rr).

The words "as income in aid of the voluntary subscriptions" seem to refer to all, and not to some only, of the general purposes of the charity. This may be important in some of the difficult cases dealt with in paragraph I above, see note (f).

V. *It has to be ascertained that the governors have not executed any deed which prevents them using the property given (or property representing it) as income for the general purposes of the charity.*

Section 62 of the Charitable Trusts Act, 1853, provides (as already set out) that "no portion of any such donation or bequest as last aforesaid (s), or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said Board or the powers or provisions of this Act".

It was held by the Court of Appeal in *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, that if the governors of the charity declare trusts of property free from the jurisdiction, and if under such trusts it is no longer competent for the governors to apply such property as income, such trusts bring such property within the jurisdiction.

The provision above quoted and the comment thereon in *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 152, do not seem to have been considered by the Lords Justices who decided *Att.-Gen. v. Mathieson*. The only way in which the decision on this point can be supported is by reading the words "and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions" in the earlier part of section 62 as applying not merely to the terms of the original gift but also to the terms on which the property may from time to time be held by the governors, and so as overriding or qualifying the exemption afforded by the provision now under consideration.

It is submitted as probable that the words "which may legally be

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(rr) *Ibid.*, at p. 154. See the words "consistently with the terms of the gift" in result No. (2).

(s) *I.e.*, an unconditional donation or gift to a mixed charity.

applied . . . as income in aid of the voluntary subscriptions" refer merely to the terms of the original gift (*rr*), and that the decision on this point in *Att.-Gen. v. Mathieson* was made *per incuriam*.

The governors of a charity may set apart or appropriate and invest gifts (free from the jurisdiction) or voluntary subscriptions for some specified object or purpose in connection with the charity—*e.g.*, the provision of a scholarship at a school or the salary of an official—and declare trusts thereof accordingly, taking care to comply strictly with the wording of the Act and also to enable capital to be used as income so as to avoid the decision in *Att.-Gen. v. Mathieson*. Then it is submitted that the property, and all gifts in aid of such fund, are free from the jurisdiction.

This provision of section 62 deserves more attention than it has received and may be very important. It may enable a wealthy mixed charity to keep out of the jurisdiction property (free from the jurisdiction) which it sets apart and devotes to a subsidiary charity. On this ground exemption may be claimed for some of the difficult cases dealt with in paragraph I above.

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It has not yet been decided what happens when property is bought by a charity out of moneys partly subject to and partly free from the jurisdiction. The answer seems to be that only property, acquired wholly out of money free from the jurisdiction, is exempt from the jurisdiction.

Where a charity has bought land, it may be exceedingly difficult—if not impossible—to prove that the purchase money was derived wholly from money free from the jurisdiction. Obviously this is so where separate accounts have not been kept of properties subject to and free from the jurisdiction. Recitals in purchase deeds as to the source of the purchase money are not always precise on this point.

A charity claiming that any particular item of its property is free from the jurisdiction, has to prove the necessary facts (*t*).

It is not creditable to English law that in the case of land, not registered under the Land Registration Act, 1925, persons dealing with charities have to go into such matters as are dealt with in this article, or that, as between vendor and purchaser, the latter has to pay the cost of obtaining proof that the land is free from the jurisdiction. Legislation should be passed enabling purchasers, mortgagees and lessees easily, quickly, and cheaply to ascertain whether any, and if so what, consents owners of unregistered land, held on charitable trusts, have to obtain to enable them effectually to complete the proposed transaction.

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(*t*) *Re Clergy Orphan Corporation*, [1894] 3 Ch. 145, at p. 154; *Att.-Gen. v. Mathieson*, [1907] 2 Ch. 383, at p. 392.

## EMERGENCY LEGISLATION AND TITLE TO LAND.

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The emergency legislation has not, on the whole, had any serious influence on the title to land or on conveyancing practice, but the mortgagee's power of sale has been considerably restricted and the rights *inter se* of landlord and tenant have been radically modified. Provision has also been made dealing with war damage and giving extensive powers of requisition. Apart from this, a number of minor matters have been the subject of statutory regulation. We have, in this article, drawn attention to the principal matters which ought to be borne in mind.

## SALE BY MORTGAGEE.

The mortgagee's power of sale is affected by the Courts (Emergency Powers) Acts and the Rent Restrictions Acts.

(a) *The Courts (Emergency Powers) Act, 1943.*

It is provided by the Courts (Emergency Powers) Act, 1943, s. 1 (2) (re-enacting the Courts (Emergency Powers) Act, 1939, s. 1 (2)), that any remedy by way of "the realisation of any security" may only be exercised with the leave of the Court. This provision applies to all mortgages, whether entered into before or after the commencement of the 1939 Act, *i.e.*, September 2, 1939, with two exceptions, namely:

(i) where the mortgagee was in possession of the mortgaged property on September 2, 1939, or had before that date appointed a receiver who was in possession, or in receipt of the rents and profits, of the mortgaged property on that date (1943 Act, s. 8, First Sched., para. 1); and

(ii) where the mortgage was entered into after September 2, 1939, and before June 12, 1941, and the power of sale was exercised before June 12, 1941 (June 12, 1941, was the date of the passing of the Liabilities (War-Time Adjustment) Act, 1941, which, by section 26 (re-enacted by the 1943 Act, s. 2), extended the operation of the 1939 Act, s. 1 (2), to mortgages entered into after September 2, 1939).

Where it is suggested that the exercise of a power of sale comes within one of these exceptions, the vendor will have to satisfy the purchaser that this is so. In the second case the facts will appear from the dates of the documents. (It seems that the date of the conveyance, and not the date of the contract to sell, is the relevant date to decide when a power of sale is exercised, as the completion of the realisation of the security does not take place till then (see *Braybrooks v. Whaley*, [1919] 1 K. B. 435).) In the first case the facts will normally be proved by means of a statutory declaration. It was held in *Re Wright and Thompson's Contract*, [1920] 1 Ch. 191, that the costs of such a declaration fall on the purchaser even where it is the mortgagee himself who is selling, as the abstract is complete without

the declaration and the declaration is not a document in the vendor's possession (Law of Property Act, 1925, s. 45 (4)).

Where an order of the Court should have been obtained but was not, the purchaser will take the land subject to the mortgagor's equity of redemption (*Colebrook v. Watson Investment Co.*, [1944] Ch. 387). It is true that the Law of Property Act, 1925, s. 104 (2), provides that the title of a purchaser under a conveyance made in exercise of the statutory power of sale shall not be impeachable on the ground "that leave of the Court, when so required, was not obtained", but it was held in *Anchor Trust Co. v. Bell*, [1926] Ch. 805, that leave of the Court under the Courts (Emergency Powers) Acts was not within the purview of the section. In *Colebrook v. Watson Investment Co.*, *supra*, the question before the Court was whether the fact that the mortgagor had joined in the conveyance rendered unnecessary the leave of the Court. It was held that, on the wording of the Courts (Emergency Powers) Act, 1914, the protection afforded by that Act could be waived, so that a conveyance by a mortgagee, with the consent of the mortgagor, but without the leave of the Court, passed the whole unincumbered fee simple; but that the protection given by the 1939 and subsequent Acts could not be waived. It must not be supposed that any difficulty arises where a mortgagor sells property and the mortgagee joins in the conveyance to release his security, for here the mortgagee is not realising his security at all. It is only where the purchase price does not exceed the amount due to the mortgagee that the purchaser must insist on an order of the Court. Further, although it was held in *Sun Life Assurance Society v. Relton*, [1942] Ch. 384, that, where a mortgagee purchased the equity of redemption from the mortgagor and then wished to sell the whole unincumbered fee simple, the leave of the Court was required, as the decision was based on the Court of Appeal decision in *Smart Brothers v. Ross*, [1942] Ch. 158, which was reversed in the House of Lords, [1943] A. C. 84, it can no longer be regarded as good law. In such a case the mortgagee is not exercising his power of sale at all: he is selling an unincumbered fee simple legally and beneficially vested in him.

Where title is made under an order of the Court a purchaser is protected by the Law of Property Act, 1925, s. 204, against defects in the proceedings in which the order was obtained, but this protection does not extend to cover a case where a person whose rights are affected by the order should have been, but was not, made a party to the proceedings (*Jones v. Barnett*, [1900] 1 Ch. 370).

#### (b) *The Rent and Mortgage Interest Restrictions Acts, 1920 to 1939.*

The Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, prevented a mortgagee of property comprising one or more dwelling-houses which came within the Acts from enforcing his security by sale or otherwise except in certain circumstances, but the Acts did not apply to mortgages created after July 1, 1920. By the 1939 Act, s. 2, this restriction on the mortgagee's powers has been extended to mortgages whenever created. To come within the Acts the mortgage must comprise at least one dwelling-house within the Acts which must be

the subject of a tenancy. The Acts do not apply to the following mortgages :

(i) mortgages comprising one or more controlled dwelling-houses and also other land where the rateable value of the controlled dwelling-house or dwelling-houses is less than one-tenth of the rateable value of the whole of the land comprised in the mortgage (1920 Act, s. 12 (4)) ;

(ii) equitable charges created by deposit of title deeds or in any other way (*ibid.*) ;

(iii) mortgages where the rent is less than two-thirds of the rateable value (*ibid.*, s. 12 (7)) ;

(iv) (so far as the power of sale is concerned) mortgages where the mortgagee was in possession on September 1, 1939 (*ibid.*, s. 7, proviso (i) ; 1939 Act, First Schedule) ; and

(v) mortgages where the principal is repayable by instalments extending over not less than ten years from the creation of the mortgage (1920 Act, s. 7, proviso (i)).

Where a mortgage comprises a controlled dwelling-house or dwelling-houses and other property, but does not come within exception (i), *supra*, the mortgagee may serve a month's notice upon the mortgagor apportioning the principal money between the controlled and uncontrolled part of the property. If the apportionment is not disputed within the month the mortgage becomes divided into two mortgages, one controlled and one not controlled (1920 Act, s. 12 (5)). If there is a dispute as to the apportionment it will be settled by arbitration. In such a case, on sale by the mortgagee of the uncontrolled part, the purchaser must be satisfied as to severance and the service of the notice of severance should be recited in the conveyance.

Proof that a mortgage, *prima facie* within the Acts, is covered by exception (iv) can be effected by means of a statutory declaration as in the case of a sale to which the Courts (Emergency Powers) Act might, but does not, apply, but, as is apparent from the nature of the other exceptions, the documents or other facts will dispense with any necessity for a declaration in those cases.

Where the Acts do apply the power of sale cannot be exercised so long as the following conditions are complied with :

- (i) interest is not more than twenty-one days in arrear ;
- (ii) the mortgage-covenants are performed and observed ; and
- (iii) the mortgagor keeps the property in a proper state of repair and pays all interest and instalments of principal recoverable under any prior incumbrance (1920 Act, s. 7).

If these conditions are fulfilled and the mortgagee purports to exercise his power of sale the purchaser does not get a good title but takes subject to the right of redemption. The purchaser will, however, get a good title if the mortgagor joins in the conveyance, this being specifically provided for in the Acts (*ibid.*, s. 7, proviso (i)), and in certain circumstances the county court can give leave to enforce the security (*ibid.*, proviso (ii)).

#### SALE BY ATTORNEY.

Before dealing with powers of attorney under the emergency legislation it may be useful to summarise the principal provisions of the

Law of Property Act, 1925, respecting powers of attorney generally. In most cases it is not necessary to have evidence that a power of attorney remains unrevoked because of the provisions of the Law of Property Act, 1925, ss. 126 and 127: where a power of attorney is given for valuable consideration and is expressed to be irrevocable (as, for example, one given by a mortgagor to an equitable mortgagee to enable the latter to convey a legal estate when exercising his power of sale), or where a power of attorney, whether given for valuable consideration or not, is expressed to be irrevocable for a period not exceeding one year, then, in favour of a purchaser, it is not revoked by the death, disability or bankruptcy of the donor of the power or by anything done by the donor without the concurrence of the donee happening, in the case of a power expressed to be irrevocable for a certain period, during that period. In cases, therefore, where either of these sections applies the purchaser merely needs evidence that the attorney has not consented to the revocation of the power: this could be covered by a recital in the conveyance.

In other cases the purchaser should require a statutory declaration under section 124 (2) of the Law of Property Act, which provides that a statutory declaration by an attorney to the effect that he has not received any notice or information of revocation of the power by death or otherwise shall, if made immediately before or within three months after any payment or act in pursuance of the power, be taken to be conclusive proof of such non-revocation at the time when such payment was made or act done. Where a grant of administration is made to an attorney the authority of the attorney is automatically determined by the death of the principal even though the grant is not revoked (*Suwerdrop v. Day* (1838), 8 A. & E. 624). This particular case is specifically covered by section 124 (2) which provides that the sub-section shall apply in such a case as if the payment made or act done under the grant had been made or done under the power of attorney.

By section 125 where a power of attorney confers a power to deal with land it must be filed at the Central Office unless it relates only to one transaction and is to be handed over on completion; and a purchaser is entitled to have a copy of the power or of the relevant portions of the power delivered to him free of expense, notwithstanding any stipulation to the contrary.

There have been two emergency Acts dealing with powers of attorney, namely, the Execution of Trusts (Emergency Provisions) Act, 1939, and the Evidence and Powers of Attorney Act, 1940.

#### *The Execution of Trusts (Emergency Provisions) Act, 1939.*

It is provided by the Execution of Trusts (Emergency Provisions) Act, 1939, that a trustee, personal representative, tenant for life or statutory owner may by power of attorney delegate to any person, or to two or more persons jointly (or jointly and severally: *Re Lord Faversham's Contract*, [1942] Ch. 33), the discretions, powers and duties vested in him during any period during which he is on "war service" and one month thereafter or any part of such period. An attorney may similarly be appointed by a trustee, etc., not engaged

on war service during any period during which he is outside the United Kingdom and for any reason connected with the war it is not reasonably practicable for him to return to the United Kingdom. The attorney appointed must be such that he could have been appointed a trustee in respect of the trust in question; he must not be the other of two trustees unless such other trustee is a trust corporation; and an attorney who has been appointed such by one trustee, whether under the Act or otherwise, cannot be appointed attorney by the other trustee (if there are only two) or by all the others (if there are more than two) (section 1). "War service" is widely defined so as to include service in any of His Majesty's armed forces, in any British ship or on any other work or employment outside the United Kingdom in connection with the war (section 7). The power of attorney might be made either before or after the commencement of the war service or absence from the United Kingdom; it must be attested by at least one witness (section 3 (1), (3)).

A person dealing with the attorney is protected, and any act done or instrument executed by the attorney is, in favour of such a person, valid, even though the power of attorney has been revoked either by the donor or by operation of law, unless that person had actual notice of the revocation (section 3 (2)). A report that a person is missing, or is missing and believed killed, is not notice of death unless death has been presumed by the Court and there is actual notice of the order of the Court (section 6). A purchaser from the attorney will not, therefore, need any evidence that the power remains unrevoked.

Evidence will, however, be needed that the power of attorney has come into operation. For this purpose it is provided that a statutory declaration by the attorney that the trustee is, or was at any specified date, engaged on war service or is absent from the United Kingdom and unable to return because of the war or that, in any transaction, the attorney is acting in execution of the trust or the administration of the estate shall, in favour of a person dealing with the attorney, be conclusive evidence of that fact (section 3 (3), (4)).

#### *The Evidence and Powers of Attorney Act, 1940.*

By section 3 of the Evidence and Powers of Attorney Act, 1940, it is provided that a power of attorney executed after June 13, 1940, outside the United Kingdom by a member of His Majesty's forces or in enemy or enemy-occupied territory by any British subject, is to be of no effect unless attested by at least one witness and filed in the Central Office. A statement in writing by the donor of a power of attorney (whether or not contained in the power) that the power is not one to which the section applies is, in favour of a person dealing with the attorney, conclusive evidence of the fact.

#### LEASES AND TENANCIES.

Where leasehold property or property subject to a lease is sold, it may be affected by the Rent Restrictions Acts, the Landlord and Tenant (War Damage) Acts, 1939 and 1941, or the Landlord and Tenant (Requisitioned Land) Acts, 1942 and 1944; and apart from statute the obligations of lessor or lessee may be modified by the exigencies of the war.

*The Rent Restrictions Acts.*

Where a house is controlled by the Rent Restrictions Acts there is nothing that actually arises on the title, but a purchaser is well advised to ascertain whether it is so controlled and, if so, whether it is within the pre-1939 Acts or not. There is a presumption that a house is controlled by the Acts (1938 Act, s. 7 (1)), but the question into which group the house falls is not easy of ascertainment or proof especially where there is doubt as to de-control, though often the local authority can throw light on the matter. The view is sometimes taken that as between the Acts, there is a presumption that a house is controlled by the pre-1939 Acts rather than by the 1939 Act, but there is no express provision to this effect in the 1939 Act itself.

The purchaser will then want to know the standard rent. Even when this is known it is difficult to prove if the relevant letting is many years old, and any evidence of the standard rent, *e.g.*, a rent book, should be carefully preserved.

Even where a house is being purchased with vacant possession, inquiries as to the position under the Rent Restrictions Acts should be made in case a letting in the future arises. Further, even though property is sold subject to a lease which is not within the Acts because the house is not let as a dwelling-house, it must not be overlooked that lawful sub-lettings by the lessee of parts of the property as separate dwellings, *e.g.*, the upper storeys of a shop, may well be protected by the Acts and binding on the lessor after the lease has expired. (See *Cottell v. Baker* (1920), 36 T. L. R. 208.)

*The Landlord and Tenant (War Damage) Acts, 1939 and 1941.*

The Landlord and Tenant (War Damage) Acts deal with two principal matters from a conveyancer's point of view: liability under repairing covenants and the effects of the various notices referred to in the Acts (disclaimer, retention, conditional retention and to avoid disclaimer).

*Liability under Repairing Covenants.*

Notwithstanding any provision to the contrary, any agreement or covenant as to repairs does not extend so as to impose any liability to make good any war damage occurring after the date of the agreement to the property. Further, where the war damage makes it impracticable, or only practicable at an unreasonable cost, or of no substantial advantage to the person entitled to the benefit of the agreement or covenant, to carry out other repairs, the obligation to do such other repairs is suspended until the war damage is sufficiently made good (Landlord and Tenant (War Damage) Act, 1939, s. 1). But a statutory obligation was imposed on the tenant as soon as practicable after the war damage became known to him to serve a notice on the landlord stating that the damage had occurred and the general nature of the damage and to permit the landlord or his agent, at such times as may be reasonable, to enter upon the premises for the purpose of ascertaining the extent of the damage and making it good. This obligation took effect as though it were a covenant in the lease (*ibid.*, s. 2).

*War Damage in the Case of Short Tenancies.*

Where premises have been rendered unfit by war damage, a rather curious state of affairs arises in connection with "short tenancies". A short tenancy is one which the tenant can determine at any time by a notice expiring not later than the end of the next complete quarter or the next complete period of three months of the tenancy, including a statutory tenancy under the Rent Restrictions Acts. In such a case there is no power of disclaimer or retention, but if the premises are wholly unoccupied no rent is payable. The result is that the tenancy may be continuing long after the tenant has left and both the landlord and tenant forgotten the tenancy. When the premises are rendered fit the tenant may claim his rights and the purchaser, hitherto in blissful ignorance that such a tenancy ever existed, find that he is saddled with a tenant, and a tenant protected under the Rent Restrictions Acts at that.

The determination of such tenancies would not, apart from special provision, be simple, as it would often be impossible to trace the tenant in order to serve notice on him, but it is provided that if the premises are fit and the tenant has not within three months resumed occupation or paid any rent and cannot be found, the county court may determine the tenancy and give the landlord immediate possession of the tenant's interest (Landlord and Tenant (War Damage) Act, 1941, s. 1).

*War Damage in the Case of Other Tenancies.*

Where premises have been rendered unfit by war damage in the case of leases or tenancies other than short tenancies, the tenant has the right to elect whether to disclaim or retain the lease, though he is not bound to take either step unless and until he is required by the landlord to make his election. In this connection there is one matter which does not appear to have been the subject of judicial consideration, namely, the liability or otherwise of a vendor to disclose the fact of war damage to the premises or the service of any notices under the Landlord and Tenant (War Damage) Acts. If premises have at any time been rendered unfit, the tenant is entitled to serve a notice of disclaimer, perhaps many years after the damage has occurred. Clearly this causes no real hardship if the war damage is slight as the notice can at once be countered by the service of a notice to avoid disclaimer, but this involves a landlord in the obligations laid down by the Acts, even though he should normally be able to recover his expenses from the War Damage Commission. The virtual effect of the occurrence of war damage to any property is to insert a proviso in any lease of it giving the tenant the right to determine the lease unless the landlord undertakes certain obligations and, in any event, to suspend the payment of rent wholly or partially for a period. It seems, therefore, that under the general rule as to disclosure the vendor ought to give to a prospective purchaser the fullest information as to any war damage which has occurred and as to any notice served by the tenant. *A fortiori*, a vendor is bound to inform a purchaser if a notice to avoid disclaimer has been served, as this will have had the effect already of incorporating into the lease fresh obligations on the part of the landlord, the burden of which will on a sale pass to the purchaser and

be enforceable against him by the tenant by virtue of the privity of estate which will subsist.

If property was the subject of a lease which has been disclaimed and in respect of which property a value payment is to be made, it would seem to be proper for the lease and the notice of disclaimer to be abstracted, as rights in connection with the payment may well be affected thereby. Where a notice of disclaimer and a notice to avoid disclaimer have been served, both should be abstracted. Similarly, if the tenant has served a notice of retention, owing to the obligations as to repair imposed upon the tenant by the 1939 Act, s. 10, to the benefit of which the purchaser from the landlord will be entitled, the notice should be abstracted.

The service of a notice of disclaimer has the effect not only of bringing the lease in respect of which it was served to an end, but also all leases derived out of that term other than (a) a sub-lease by virtue whereof any person is entitled to actual occupation and in respect of which no notice of disclaimer has been served, and (b) a sub-lease in respect of which the Court has made an order excepting it from the operation of the notice of disclaimer (1939 Act, ss. 8 and 9). The Court may make an order vesting a disclaimed lease in a sub-tenant on such terms as the Court thinks fit (*ibid.*, s. 9). In *Re Thompson and Cottrell's Contract*, [1943] Ch. 97, the Court had to consider the position of an underlessee who had contracted to sell his leasehold interest without disclosing that the lease out of which it was derived had been disclaimed under the Bankruptcy Act, 1914, by the trustee in bankruptcy of the head lessee. The purchaser contended that the vendor had not shown a good title and ought to apply to the Court to have the head lease vested in herself. Uthwatt, J., held that, although the position was curious in that the covenants in the underlease were not enforceable by either side whereas those in the head lease (so far as affected the right of re-entry) were, a good title had been shown.

The foregoing paragraphs relative to matters arising out of the Landlord and Tenant (War Damage) Acts apply in the main to freehold land which is, or has at some time been, the subject of a lease, but they apply with few and obvious modifications to the case of leasehold property. The short general result seems to be that on the sale of any property the vendor should disclose all available information about war damage without being asked, but a prudent purchaser will in his own interest direct the vendor's attention to the subject by a suitable preliminary inquiry; from a purchaser's point of view it is usually wiser to remind a vendor of his obligations before completion rather than rely on a remedy in damages later if the vendor should fail to disclose all he ought to.

#### *The Landlord and Tenant (Requisitioned Land) Acts, 1942 and 1944.*

The Landlord and Tenant (Requisitioned Land) Acts, 1942 and 1944, are merely mentioned for the sake of completeness as they can have but little importance in conveyancing. Shortly, the effect of the 1942 Act is that where premises are requisitioned on behalf of the Crown in exercise of emergency powers, and there is a lease of those premises with not more than five years to run or a lease determinable

at the end of the war or not later than one year thereafter, and the tenant or his family is in occupation of the premises for residential or business purposes, the tenant is entitled to serve a notice of disclaimer on the landlord, whereupon the lease is deemed to be surrendered. The tenant's right to remove fixtures may be exercised within a reasonable time of the giving up of possession under the emergency powers.

The 1944 Act modifies repairing covenants in leases of property requisitioned in exercise of emergency powers. The Act is retrospective to August 24, 1939. During the period of the requisition damage to the property is the obligation of the requisitioning authority and compensation therefor may be claimed under the Compensation (Defence) Act, 1939. Accordingly, it is provided that the tenant shall not be liable under any repairing covenant in respect of any damage occurring during the period of requisition if either the lease comes to an end during the period of requisition or compensation becomes payable in respect of such damage.

#### EXTRA-STATUTORY EFFECT OF THE WAR ON REPAIRING OBLIGATIONS.

A subject with which everyone, lawyers and laymen alike, is well acquainted is the difficulty of carrying out repairs during the war and in the immediate post-war period. This difficulty is of importance with regard to repairing obligations of lessees and to rights under leases depending on the fulfilment thereof. In view of the regulations affecting repairs many lessees have not worried too much about repairs which they were bound to do but have failed to carry out. One point which they overlook is that at all times it has been permissible to perform something in the way of repairs, but they have not even troubled to do what they could. Apart altogether from this, the hardship inflicted on the landlord if a tenant were permitted not merely to fail in his obligation (for which he would not be at fault) but also allowed to escape without any monetary payment would clearly be indefensible.

In *Maud v. Sandars* (1943), 60 T. L. R. 8, it was argued that as more than £100 of repairs without a licence could not then be carried out the lessee could not be liable for more than this sum on a dilapidations claim. This argument was rejected by the Court on the short ground that there was no evidence that, had a licence been applied for, it would have been refused. In any event it can hardly be supposed that the doctrine of frustration would apply.

Apart from the liability for dilapidations there is another important aspect of the matter. Options to renew (and to determine) leases are generally conditional on the compliance by the tenant with the covenants in his lease and, if the covenants are not strictly and literally fulfilled, however impossible this may have been, there are no means whereby a tenant can get relief. When buying leasehold property, therefore, the purchaser should pay special attention to rights conditional on the performance of the lessee's covenants as well as being naturally concerned to see how far such covenants have been fulfilled.

## WAR DAMAGE.

Where war-damaged premises are sold it is vital to know whether a cost-of-works or a value payment will be made, for the former is always payable to the person who has the premises put in repair and the latter in almost every case to the owner at the time of the damage (War Damage Act, 1943, ss. 9 and 12), and no assignment of the right to payment is valid without the consent of the War Damage Commission (*ibid.*, s. 23), which is only rarely given. Where, therefore, a purchaser buys land in respect of which a cost-of-works payment is to be made he should be satisfied that a claim has been duly made. If it has not been made, a claim should be put in before completion which will have to be supported by a statutory declaration. There seems to be no obligation upon a vendor (in the absence of express stipulation) to give a purchaser any assistance with regard to a claim against the War Damage Commission, and certainly a purchaser must pay the costs of any statutory declaration he requires.

An exception to the rule mentioned above whereby the owner at the time of the damage is the recipient of a value payment occurs where a cost-of-works payment would normally have been made but the premises are subsequently compulsorily acquired. A common example of this is where the premises have been totally destroyed, leaving merely a vacant site, but by virtue of the Treasury Direction a cost-of-works payment is nevertheless due to be made (*e.g.*, because the house was built after 1914). In such a case the cost-of-works payment is converted into a value payment (*ibid.*, s. 14 (1)), and it is expressly provided that the owner at the date of the compulsory acquisition is the person to receive the value payment (*ibid.*, s. 14 (2)).

Where it is not clear whether there will be a cost-of-works or a value payment, the purchaser must proceed very warily indeed. The War Damage Commission has issued repeated warnings to the public about the non-transferability of value payments, but still it is not unknown for a purchaser to pay far more than site value in the expectation of receiving a cost-of-works payment in due course, when ultimately a value payment is determined upon. The only safe course where there is any doubt is to obtain the Commission's ruling before entering into a contract, or, if found more expedient, to have a special stipulation making the contract conditional upon the Commission's determination.

## REQUISITION.

The effect of requisition between contract and completion, a matter which still arises and, indeed, in the case of vacant dwelling-houses is more frequent now than during the war, has been considered in a number of cases which are of more than passing interest. The general rule is that on the exchange of contracts the equitable title to the property passes to the purchaser so that he must bear the risks of fire, tempest and other calamities. Against this must be set the principle that, subject to contrary provision in the contract, the vendor is under an obligation to give vacant possession on completion (*Cook v. Taylor*, [1942] Ch. 349). Hence the purchaser need not complete if the property is requisitioned, and *a fortiori* if it is compulsorily acquired, before completion.

But this principle does not solve all difficulties and two further points arise: Is the relevant time for vacant possession the actual date of completion or the time fixed for completion? What act or event makes the requisition effective? In *Re Winslow*, [1941] Ch. 503, one of the earliest cases, the original date fixed for completion was January 13, later altered to January 25. The vendor was ready to complete on February 3. Notice of intention to requisition had been served on January 25 but, as actual possession had not been taken by February 3, the Court held that the purchaser must complete. This decision does not lay down any clear principle on the first point, but in *James Macara, Ltd. v. Barclay*, [1945] K. B. 148, the Court of Appeal appeared to consider the date fixed for completion as the relevant one. This would appear to be a just rule but it may well be subject to one exception, namely, that where delay in completion is due to the vendor's default, the relevant date is when the vendor is ready to complete.

In *Cramp v. Hughes*, [1944] W. N. 181, the Court treated the service of the requisition notice as the date when the requisition takes effect and this view, which is consistent with the practice as to claiming compensation in respect of the requisition, has been confirmed by the Court of Appeal in *James Macara, Ltd. v. Barclay*, *supra*.

Once the purchaser has rescinded the contract because of service of the requisition notice its subsequent withdrawal will not affect the position (*James Macara, Ltd. v. Barclay*, *supra*).

#### COPYHOLDS.

Copyhold land is taking an unconscionable time a-dying. Under the Law of Property Act, 1922, in the case of those manorial incidents which were abolished subject to compensation the time fixed for abolition (subject to prior abolition by agreement or notice) was at the end of 1935, but the lord of the manor was entitled to compensation and apply for its assessment down to the end of 1940. By the Postponement of Enactments (Miscellaneous Provisions) Act, 1939, s. 3, no application could be made during the war, but they may be made during a period of one year after a date to be appointed. No such date has yet been appointed.

#### SEARCHES.

Orders made under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, may affect the title to land in a similar way to orders under the Bankruptcy Act, 1914, and the rent may be reduced thereunder. No special search for such orders need be made as they are registrable as a writ or order affecting land under the Land Charges Act, 1925 (1944 Act, s. 16).

As regards the time for completion after an official search, by the Land Charges Rules, 1940, it has been extended from two to fourteen days, with a corresponding increase in the times for registering a priority notice from at least two days before completion to at least fourteen days, followed by registration of the actual charge not later than twenty-eight days after registration of the priority notice instead of fourteen days.

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## CORRESPONDENCE.

*Appointment of New Trustees.*

We have received the following communication:—

May I revert to the subject of Appointments of New Trustees of Land, where the trust fund includes land held in trust for sale?

The particular question I have in mind is, "Who has power to make the appointment?"

Since the person having power to appoint trustees can also transfer the legal estate by means of a vesting declaration, the question is important in the investigation of titles.

The answer depends upon the meaning of the words "the instrument creating the trust" in section 36 of the Trustee Act, 1925.

It should be borne in mind that section 36 is for all material purposes a verbatim repetition of the corresponding section in the Trustee Act, 1893, so that in construing it one must disabuse one's mind of the draperies of 1925.

It should also be made clear at the outset in order to preclude a possible confusion of thought that I am not concerned with the question whether the trustees can in any given circumstances confer a good title by means of a deed of conveyance in favour of a purchaser without notice of the trust, but merely with the question "Who has power to appoint new trustees and to execute a Vesting Declaration?" or to put the matter in other form, "Who is the person nominated by the instrument creating the trust referred to in section 36?"

This question has always seemed to me a little puzzling. The text-books and the Law of Property Act (Fifth Schedule, form 9) skate over it. I can best explain my misgivings by considering four hypothetical cases:—

*Case I.*—In 1900, the trustees of a settlement hold money in trust for A for life, remainder to B. The settlement empowers the trustees to invest in land and A to appoint new trustees. The trustees invest the money in the purchase of Blackacre, taking the conveyance (in 1905) to themselves in fee simple as joint tenants "in trust for X absolutely", X being a stranger and a volunteer.

It is submitted (1) that the spurious trust declared in the conveyance is merely nugatory; (2) that notwithstanding that spurious trust the trustees hold Blackacre on the trusts of the original settlement; (3) that the "instrument creating the trust" mentioned in section 10 of the Trustee Act, 1893, is the original settlement, "the trust" being the original and the only effective trust created by that settlement and not the spurious and ineffective trust declared by the conveyance; and (4) that A can therefore appoint new trustees and transfer the legal estate in Blackacre by means of a vesting declaration.

If these assumptions are correct, then two different parties are simultaneously capable of transferring the legal estate in Blackacre, viz., the trustees by means of a deed of conveyance to a purchaser without notice (the purchaser would no doubt ask X to concur) but not by means of a vesting declaration, and A by means of a vesting declaration though not by means of a conveyance.

*Case II.*—Is similar to Case I except that the conveyance is to the trustees in fee simple as joint tenants on trust to sell Blackacre and to stand possessed of the proceeds on trust for X absolutely.

Here, it is submitted that the same reasoning applies, the trust for sale being as spurious as the trust in favour of X. The consequences are therefore (1) that the only subsisting trusts affecting Blackacre in the hands of the trustees are those declared by the settlement and that the trustees as between themselves and the beneficiaries hold Blackacre on those trusts and not on trust for sale at all; (2) that A can therefore appoint new trustees and transfer Blackacre by vesting declaration, he being the person nominated for the purpose by "the instrument creating the" only subsisting "trust". The reason, of course, is that

instantly the trust money is invested in Blackacre then automatically and inevitably Blackacre becomes impressed in equity in the hands of the trustees with the trusts previously affecting the trust money and that nothing that may be inserted in the conveyance to the contrary or for that matter to the same purpose alters that state of affairs or erases or supersedes the impression of the original trusts from Blackacre in the hands of the trustees.

*Case III.*—In 1900 the trustees of a settlement hold money in trust for A for life with remainder to B. The settlement declares (a) that the trustees may invest in land; (b) that if they do, the land shall be held by them on trust for sale with power to postpone sale; (c) that A during his life is empowered to appoint new trustees. The trustees invest the money in the purchase of Blackacre, taking the conveyance (in 1905) to themselves in fee simple as joint tenants in trust for sale and to hold the proceeds of sale on the trusts of the original settlement, but the conveyance declares that the statutory power of appointing new trustees shall apply.

Here it is submitted for the reasons explained in Case II above (1) that although the so-called trust for sale in the conveyance corresponds with that in the settlement, nevertheless it is the trust for sale in the settlement which alone is effective, and (2) that the power to appoint new trustees is therefore vested in A and that A alone can execute a vesting declaration.

*Case IV.*—Is similar to Case III except that the settlement and conveyance are dated in 1915 and that the settlement contains no declaration that if the trustees invest in land they shall hold that land on trust for sale, the omission being supplied by section 10 of the Conveyancing Act, 1911.

Here it is submitted that the results are the same as in Case III, the effect of the section in the Conveyancing Act, 1911, being to write into settlements authorising the investment of trust money in land a declaration that if trust money is so invested, the land shall be held in trust for sale. Neither this section, it is thought, nor its counterpart in the Trustee Act of 1925 was intended to or did alter the meaning or effect of the words "the person nominated in the instrument creating the trust" in the Trustee Act.

Since section 10 of the Trustee Act, 1893, was for all relevant purposes imported verbatim into and now constitutes section 36 of the Trustee Act, 1925, it is submitted that the two sections cannot be construed differently.

For the reasons explained above, may it not be at least arguable that where trustees of a trust document authorising investment of trust money in land make such an investment and take a conveyance to themselves in trust for sale, then, notwithstanding the contents of the conveyance of the land to them, (a) "the person nominated in the instrument creating the trust" mentioned in section 36 of the Act of 1925 is the person (if any) nominated in the trust document; (b) the person nominated in the trust document to appoint trustees and nobody else (whatever the conveyance of the land to the trustees may say) can appoint new trustees and can transfer by vesting declaration the legal estate in the land; (c) that no trustee of the land can retire without that person's consent; (d) that it is therefore incumbent upon a prospective purchaser of the land (if the abstract of title includes a vesting declaration expressed or implied under the Trustee Act) to investigate the trust document as well as the conveyance on trust for sale; and (e) that the "way out" is for land held on trust for sale always, on an appointment of new trustees, to be transferred by means of a deed of conveyance and not by means of an express or implied vesting declaration.

*Note.*—We feel that the difficulty primarily arises from the fact that the framers of the Act assumed that their instructions would be observed and secondarily from the confusion concerning the effect of the "curtain" hiding trusts for sale which seems to have been understood imperfectly in connection with trusts for sale and was a comparatively modern development where the trusts and conveyance were contained in the same document: cf. *Re Chafer and Randall's Contract*, [1916] 2 Ch. 8; *Re Soden and Alexander's Contract*, [1918] 2 Ch. 258.

If the trusts are not incorporated in the conveyance to the trustees for sale it is assumed that a purchaser is not concerned with the contents of the trust instrument: cf. L. P. A., s. 27 (1). The same point is overlooked in connection with necessary consents to the exercise of a trust for sale: cf. L. P. A., s. 26 (1). It can be argued that the conveyance to the trustees for sale constitutes the instrument creating the trust affecting the land and the trust instrument only creates the trust of the proceeds of sale, so that unless there is anything in the deed conveying the land to the trustees for sale to indicate the person having the power to appoint new trustees, a purchaser can act on the assumption that there is no such person and that an appointment made in pursuance of the facts as disclosed in the conveyance to the trustees for sale will be effective. The whole complicated range of the provisions entitling a purchaser to disregard facts of which he is more or less aware is so complex that we feel unwilling to express a concluded opinion.

### THE LIBRARY.

*The Town and Country Planning Act, 1944. An Annotated Analysis of the Act.* By DESMOND HEAP, LL.M., L.M.T.P.I., Deputy Town Clerk of Leeds, etc. 1945. London: Sweet & Maxwell, 2 and 3 Chancery Lane, W.C.2. pp. xlii and 298. Price 21s.

This work contains an Introduction of about thirty pages, a King's Printer's copy of the Act and an annotated analysis of the sections. The King's Printer's copy is bound in with the rest and is, of course, indexed as part of the book. This alone is valuable in this wilderness of legislation.

The learned author tells us that in Parliament it was said that "the whole Bill is designed so that both landlords and local authorities should be butchered to make a lawyer's holiday". The noble Earl, who said this, had, in our opinion, a queer notion of what constitutes a lawyer's holiday, but it at least is an indication that it behoves the lawyer, and more particularly the conveyancing lawyer, to acquaint himself with the terms of legislation that is likely to cause his clients considerable difficulty. Mr. Heap will be known to subscribers for his article on the subject in our last volume. This is the substance on which our readers may get the information on this difficult subject. The Introduction gives a general survey and points out that this Act is not primarily concerned with planning, but with powers of compulsory acquisition, and it is for this reason that the ordinary conveyancer is more than usually concerned with it. The annotations not only endeavour to make plain what Lord Simon described as "a difficult Bill to follow", but links it up with the rest of the jungle that is called, or intended to be, planning legislation. Whether we like it or not, and the absence of case law and the wilderness of cross-reference makes legislation of this type peculiarly repulsive to the Real Property lawyer, it is vital to remember that much of the land law is and will be "secreted in the interstices" of planning legislation, and that it is well to acquire knowledge bit by bit. We commend this work for giving general ideas and for an analysis of necessary information to apply to particular problems.

### BOOKS RECEIVED.

*A Handbook on the Death Duties.* By H. ARNOLD WOOLLEY. Fifth edition. The Solicitors' Law Stationery Society, Ltd. 21s. net.

*Burke's Loose Leaf War Legislation.* 1944-45, Parts 5 to 10. Hamish Hamilton (Law Books), Ltd.

*The Essential Work Order.* By H. SAMUELS, M.A. Stevens & Sons, Ltd. 2s. 6d. net.

*Learning the Law.* By GLANVILLE L. WILLIAMS, M.A., LL.B. Second edition. Stevens & Sons, Ltd. 7s. 6d. net.

*Palmer's Private Companies, Their Formation and Advantages.* 39th edition. Stevens & Sons, Ltd. 2s. 6d. net.

## NOTES OF RECENT CASES.

## 1. PROPERTY AND CONVEYANCING CASES.

*Contract for sale—no completion—agent's commission.—Poole v. Clarke & Co.*, [1945] 2 A. E. R. 445, shows that in ordinary circumstances an estate agent has not completed his part of the contract by finding a purchaser who signs an enforceable contract to purchase the property. He must go further and show that the purchaser is both willing and able to complete the contract for sale. Here the purchaser was unable to find the purchase money and so the contract was not completed. The vendor sued to recover the whole deposit without deduction of commission. Singleton, J., held that he could recover.

The point of this case goes further than *Luxor, Ltd. v. Cooper*, [1941] A. C. 108 (noted *ante*, Vol. 5, p. 294) which only prevented the agents from recovering if the purchaser subsequently refused to sign the contract. Singleton, J., relied upon *James v. Smith*, [1931] 2 K. B. 317 n., in which case both Bankes, L.J., and Atkin, L.J., laid emphasis upon the fact that the purchaser must be able as well as willing, and upon the observation of Simon, L.C., in *Luxor, Ltd. v. Cooper (supra)*, at p. 117, where the learned Lord Chancellor said, "The agent necessarily incurs certain risks, *e.g.*, the risk that his nominee cannot find the purchase price or will not consent to terms reasonably proposed to be inserted in the contract of sale".

At the same time we should emphasise the fact that each contract with an estate agent must be viewed on its own merits. It is in the absence of express mention of such points that these cases are material.

*Solicitor's lien—solicitor acting for mortgagee and mortgagor—solicitor one of the mortgagees.—In Barratt v. Gough-Thomas*, [1945] 2 A. E. R. 414, a solicitor acted for a purchaser, who mortgaged to another client of the solicitor. Subsequently the mortgagee died and the solicitor became one of four personal representatives in whom the mortgage vested. Vaisey, J., held that, although the solicitor had had the title deeds the whole time, he could not, after the date of the mortgagee's death, set up his lien against the mortgagor, because he held the title deeds not as solicitor but as one of several trustees. The learned Judge also approved the decision of Bacon, V.-C., in *Re Nicholson* (1883), 53 L. J. Ch. 302, to the effect that in any case where a solicitor acts for both mortgagor and mortgagee he loses his solicitor's lien as against the mortgagor.

*Settlements—determinable life—effect of appointment of Receiver in lunacy.—Re Custance's Settlement*, [1945] 2 A. E. R. 441, offers a warning concerning the framing of discretionary trusts. Here the life tenant had an interest for life except while he was under twenty-five or while "by reason of any act or event (other than the exercise of any power thereby or by statute conferred on [the life tenant])" the estate would "if an absolute estate or interest have become . . . vested or charged in favour of some other person or persons or a corporation". The life tenant became subject to various orders in lunacy and ultimately an order for a Receiver was made which provided for his remuneration, and under the Lunacy Act,

1890, s. 148 (3) such remuneration "shall be charged upon the estate of a lunatic". In *Re Marshall*, [1920] 1 Ch. 284, Eve, J., held that the mere appointment of a Receiver did not work a forfeiture of a determinable life interest, but he was not asked to decide the effect of section 148 (3). In *Re Tancred's Settlement*, [1903] 1 Ch. 715, Buckley, J., held that the appointment of a person to manage the estate and pay himself his remuneration did not work a forfeiture, because, as with a Receiver in lunacy, he was merely the agent of the life tenant who remained solely entitled to the rents and profits of the estate. But in the instant case Cohen, J., held that the effect of section 148 (3) was to operate to charge the remuneration of the Receiver upon the life tenant's property and so to work a forfeiture. In effect, therefore, the appointment of a Receiver with remuneration defeats its own object except so far as the forfeiture is followed by a discretionary trust in which the trustees elect to pay the whole or part of the income to the life tenant.

In framing protected life interests this decision needs to be borne in mind. No doubt the normal protective trusts need not be unduly affected, but it should be remembered that an order under the Lunacy Act, 1890, is not confined to persons of unsound mind, since it can be made wherever a person is by reason of age or infirmity incapable of managing his own affairs. Nevertheless, in such circumstances it may often be most convenient that the whole of the rents and profits should not be paid to or on account of the life tenant whose wants may be provided quite adequately with a less sum.

(2 K. & E. p. 577 n. (o).)

*Trusts—advancement—father paying son's premiums.—Re Roberts*, 61 T. L. R. 574, is an interesting sidelight on *Re Smith*, [1937] Ch. 686 (noted *ante*, Vol. 2, p. 176), concerning the right of a trustee of a policy to recover premiums paid to maintain it. The case is the more important because of the "educational policy" that is becoming more and more common, by which the parent takes out a policy on the life of his child to provide an educational endowment (at, say, fourteen), or if not then required becomes a life policy. In the instant case the testator had taken out a life policy on his son's life in 1907 and the policy moneys were to be paid to the testator "but always as trustee or trustees for the life assured". In fact the testator died in the lifetime of the son (who died shortly thereafter), and by his will bequeathed the benefit of the policy to the son's wife and children. The personal representatives of the testator paid the premiums out of his estate until the son's death. It was argued that the premiums were paid by a trustee to preserve the trust property and that, therefore, the testator's personal representatives could recover them out of the policy moneys. In *Re Smith (supra)* a husband, who had paid premiums on a policy taken out by his wife after the death of the wife, was held entitled to recover the premiums as paid by a trustee. Evershed, J., distinguished *Re Roberts (supra)* from *Re Smith* because Luxmoore, J., in the earlier case had pointed out that the relationship of husband and wife had ceased on the death of the wife and that, therefore, there was the pure relationship of trustee and beneficiary. Evershed, J., then went on to hold that on the scanty facts in *Re Roberts* there was an intention on the part of the testator as a father to make an advancement to his son. In these circumstances the relationship of trustee and beneficiary was changed. Consequently, the premiums paid to the date of the father's death were not recoverable.

It is to be noted, first, that an intention to advance is really a question of fact to be deduced from such evidence as is available, but is presumed apart from available evidence in appropriate circumstances; secondly, that *Re Smith* (*supra*) does not cover premiums paid by a husband on a policy taken out by a wife during the wife's lifetime; this will now follow *Re Roberts* (*supra*) where the presumption of advancement to a wife can be implied.

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*Trusts—remuneration of trustees—business turned into company under testator's will—directors' fees.*—It is, perhaps, one of the most troublesome features of drawing wills that testators require a good deal from their personal representatives for which they cannot be paid without express provision. No matter is more difficult than that where the trustee has to carry on a business in some form or another. These cases are full of distinctions. In *Re Macadam*, 61 T. L. R. 48, which is the most recent case, Cohen, J., decided that directors of a company created to take over a business as directed by the will of which the directors were trustees could not take the directors' fees beneficially. The principle that the learned Judge followed appears to be this. The directors became directors because they were trustees of the will and they therefore owed their position and capacity to take fees to their position as trustees, consequently they would be making a profit out of their trusts if they were allowed to receive them beneficially. It should be added that a note to the report suggests that in fact the learned Judge was prepared to consider awarding the trustees remuneration in the special circumstances.

The decision largely follows *Williams v. Barton*, [1927] 2 Ch. 9, where a half-commission agent employed his firm to value property, of which he was trustee, and it was held that he could not keep the commission, but, as his Lordship pointed out, this was a much stronger case. He distinguished *Re Dover Coalfield, etc., Co.*, [1908] 1 Ch. 65, where the directors were given their qualifying shares as trustees after they had agreed to serve on the Board and they had been requested to act as directors by the company transferring the shares before the shares were transferred. In *Re Macadam* (*supra*), the trustees had apparently become directors on their own initiative and not on that of anyone else. The learned Judge also distinguished *Re Lewis*, 103 L. T. 495, where the trustee was trustee of a share in a partnership under his father's will but who had been employed by the firm prior to his father's death and continued to be employed by the firm afterwards by a separate agreement negotiated with the other partners. It will be observed that the emphasis largely lies upon whether the trustees have acquired their remuneration in respect of the property held by them as trustees. It also emphasises the need to draw remuneration clauses in wide terms to cover more than mere professional assistance from professional trustees.

(2 K. & E., p. 924 n. (d), p. 925 n. (f).)

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*Separation deed—deed reciting husband's desire to live apart—no termination of husband's desertion.*—*Smith v. Smith*, [1945] 2 A. E. R. 452, arose out of proceedings for divorce based on desertion by the husband where the deed contained a recital that the husband desired to live apart and the usual clause against molestation by either party. The husband had deserted the wife prior to the deed and the wife had refused to sign a deed in the usual form that the parties agreed to live separately. The usual form is a bar to divorce based on desertion: *Long v. Long*, [1940]

4 A. E. R. 230 (noted *ante*, Vol. 5, p. 216), and this, notwithstanding the miscomprehension of the petitioner when he signed the deed. Pilcher, J., in *Smith v. Smith* (*supra*), however, was able to hold that as the desire to live apart was expressed on behalf of the husband alone, this did not constitute the termination of the desertion. The learned Judge also said (at p. 453): "The retention in the agreement of the non-molestation clause does not cause me any difficulty, as it does not seem to me to be in any way inconsistent with the wife's expressed wish that her husband should return to her, or to afford the husband any excuse for continuing to refuse to return. At first sight the agreement not to institute proceedings for restitution of conjugal rights would appear to connote an acquiescence by the wife in the existing state of affairs. On closer examination I am not, however, satisfied that this is so . . . she [the wife] merely undertakes not to avail herself of a remedy. It is, moreover, common knowledge that petitioners in restitution suits have seldom, if ever, entertained any hope that the party in alleged default would obey the order made and return to cohabitation".

This case illustrates the difficulties now experienced in drawing satisfactory separation deeds which are intended primarily to provide for the maintenance of a wife when the parties are living apart. The deed in such cases is normally a compromise to avoid litigation to ensure provision for the wife. In such circumstances the usual form of separation deed derived from the old law (see *e.g.*, 2 K. & E., p. 525) is not appropriate where, as is common, one party has left the other. It seems to us that the wiser and fairer course is to insist upon adequate recitals to this effect.

(2 K. & E., p. 529, notes (d) and (e).)

*Infants—custody of husband—child born before marriage.*—When a child is born before marriage but falls within the Legitimacy Act, 1926, and so capable of legitimation, the husband is entitled to apply for custody in divorce proceedings notwithstanding that no decree of legitimacy has been obtained. This was held by Denning, J., in *Millard v. Millard*, [1945] 2 A. E. R. 525, notwithstanding those decisions of first instance to the contrary where the child was claimed to be legitimated *per subsequens matrimonium*. The learned Judge declined to follow the earlier cases on the ground that they were inconsistent with the decision of the Court of Appeal in *Langworthy v. Langworthy* (1886), 11 P. D. 85, in which custody had been awarded in a nullity suit on the principle that jurisdiction depended on parenthood and not legitimacy.

(See *ante*, p. 69, for practice note.)

*Charitable purposes—Anti-Vivisection Society—main object beneficial to the community.*—The *I. R. C. v. The National Anti-Vivisection Society*, [1945] 2 A. E. R. 529, adds, or emphasises, a new terror to draftsmen drawing dispositions for charitable purposes. In this case the question was whether the society was charitable, that is to say, whether it was "established for charitable purposes only". In *Re Foveaux*, [1895] 2 Ch. 501, Chitty, J., had held that its predecessor was a charity. On appeal from the Special Commissioners, Macnaghten, J., held that (i) it was the duty of the society to prove by evidence that it was established for general charitable purposes; (ii) general charitable purposes must be "for the benefit of the public"; and (iii) anti-vivisection on the evidence was not for the benefit of the public, and consequently the society was not

a charity. This involved the learned Judge in deciding not to follow *Re Foveaux* (*supra*), a decision that has not escaped criticism, but is of very old standing and was not dissented from by Cozens-Hardy, M.R., in *Re Wedgwood*, [1915] 1 Ch. 113.

The learned Judge based his decision on two cases, or rather on *dicta* in two cases. In *Re Hummeltenberg*, [1923] 1 Ch. 237, Russell, J. (as he then was) said at p. 242: "It was contended that the Court was not the tribunal to determine whether a gift or trust was or was not a gift or trust for the benefit of the public. . . . So far as the views so expressed declare that the personal or private opinion of the Judge is immaterial, I agree, but so far as they lay down or suggest that the donor of the gift or the creator of the trust is to determine whether the purpose is beneficial to the public, I respectfully disagree". Russell, J., then went on to say (in a *dictum* approved in the Court of Appeal by Hanworth, M.R., in *Re Grove-Grady*, [1929] 1 Ch. 557): "The question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it".

Let it, first, be observed that this principle would not seem to apply to trusts for the advancement of religion or education or the relief of poverty which presumably the Judges are estopped from considering as anything but beneficial to the community. It is only within the last class of "trusts for other purposes beneficial to the community" that this burden of proof lies. It is a class, however, of increasing importance that is indeed likely to increase much more. What, perhaps, is most disconcerting is the prospect that little reliance will be able to be placed in this respect upon older decisions. If it is a question of proof in each case there is no doubt that the current of opinion on public benefit does suffer, and is likely to suffer, change. We have had occasion to observe the pendulum swinging in favour of the "fine arts", and now it has swung away from anti-vivisection. We would like to offer an observation on another example. We have authority for the view that education in a particular political doctrine is not charitable: may we suggest that in a new age and on new evidence it might be found that the balance of evidence is in favour of its being for "other purposes beneficial to the community", and so long as the benefits were sufficiently "public" it might now be held to be charitable. We do feel that this aspect of charities needs real clarification, for to rely on the changes and chances of what evidence may show that public opinion or some such vague entity thinks is for the public good is a "chancy business".

From a drafting point of view this difficulty can be overcome by a general provision that any trusts are valid so long only as they are charitable (cp. clause 3 in Form 7, Vol. 8, p. 282). This involves the trustees in responsibility, and should it be adopted the trust instrument should also provide that the trustees will not be personally liable if they mistakenly apply the property to a purpose within the general character of the scheme; but which in fact is a breach of trust because it is not charitable.

(2 K. & E., p. 299.)

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## 2. WILL CASES.

By J. H. C. MORRIS, M.A., B.C.L., of Gray's Inn, Barrister-at-Law.

*Whether "issue" means "children"—rule in Sibley v. Perry.*—Victorian conveyancers used to make heavy weather of substitutionary gifts. If a testator wished to benefit several named persons or members of a class, it was natural for him to provide that if any of them died before the period

of distribution leaving issue, such issue should take between them the share which their parent would have taken if living at the critical date. Such a gift appears simple to draft, but in fact involves a number of traps for the unwary. These traps have become so notorious that modern conveyancers generally succeed in avoiding them. One such trap is the rule in *Sibley v. Perry* (1802), 7 Ves. 522, where Lord Eldon laid it down that if the testator speaks of the "parent" of issue, the word "issue" ceases to mean issue *ad infinitum*, and means children of the first generation only. Although Lord Eldon was probably speaking only of the actual will before him, later Judges elevated his language into a general rule of construction which, like so many artificial rules, frequently defeated intention. But the reaction was not long in coming. In *Ross v. Ross* (1855), 20 Beav. 645, Romilly, M.R., managed to escape from Lord Eldon's rule on the ground that, whatever the ambiguity of the gift to issue, the gift over in default of issue clearly referred to issue *ad infinitum*. In *Ralph v. Carrick* (1879), 11 Ch. D. 873, the rule was displaced on this ground and also on the ground that the testator said "descendants", which requires a stronger context to restrict it to children than the word "issue". Although the rule was applied by the Court of Appeal in *Re Timson*, [1916] 2 Ch. 362, it has lost favour with modern Judges and will not be applied if it is clear from the whole will that the draftsman understood the distinction between children and issue.

*Re Hipwell* (1945), 173 L. T. 192, is a good illustration of this modern tendency. The testator, who died in 1882, had six daughters. He left a trust fund for each daughter on trust to pay the income to the daughter for life. After her death he gave her a power of appointment among her "children or the issue of any such child". In default of appointment the fund was to be held in trust for the daughter's "children or child" who attained twenty-one. If the daughter had no child the trusts were for "the others or other of my daughters who shall be living at her death and the issue then living of any of them who shall have previously died leaving issue, such issue to take their parents' share". One daughter died a spinster in 1943 and the capital of her trust fund fell to be distributed. The question was whether a great-nephew of the spinster was entitled to share (his mother and grandmother both being dead) or whether he was excluded by Lord Eldon's rule. The Court of Appeal, reversing Uthwatt, J., decided that as the testator had drawn a clear distinction in other parts of the will between children and issue, when he said "issue" he meant "issue", and therefore the rule in *Sibley v. Perry* did not apply and the great-nephew was entitled. Lord Greene gave a warning against construing wills in watertight compartments: it was incorrect, he said, to seize on the word "parent" used in conjunction with "issue" in order to put the rule in *Sibley v. Perry* in the saddle, and then try to find something further in the will which would knock it out of the saddle. The correct course was to construe the will as a whole. Morton, L.J., said that, like Brett, L.J., in *Ralph v. Carrick*, he would be very glad to be present at the funeral of *Sibley v. Perry*. It is hard to see how the rule can fail to defeat the testator's intention except in very exceptional circumstances. It is much better to interpret the word "parent" in a sliding sense so as to embrace successive generations.

(Theobald 283.)

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*Annuity—insufficient estate—direction to provide annuity fund—gift over of balance of fund on death of annuitant—method of valuation.*—The steeply rising curve of war-time taxation has, not unnaturally, played havoc

with gifts of tax-free annuities, and since 1939 the Courts have frequently had to solve difficult problems of administration when the testator's estate proves insufficient to provide for the annuities in full. A particularly difficult problem of this nature, the solution of which in the present state of the authorities cannot be said to be settled, arises in the following circumstances. The testator gives an annuity to X, directs his trustees to set apart a fund sufficient by its income to produce the annuity, with power to resort to capital if the income is insufficient, and on the death of X gives the capital of the fund or so much of it as remains to Y. The estate proves insufficient to carry out the testator's directions in full. The Judges have adopted three different methods of solving this problem:—

(1) In *Re Nicholson*, [1938] 8 A. E. R. 270, Crossman, J., held that the amount of the fund, and not the actuarial value of the annuity, was the value of the annuity for purposes of abatement; and that Y was entitled to any balance in the abated fund after X had been paid in full during the rest of her life.

(2) On the other hand, in *Re Farmer*, [1939] Ch. 573 (Farwell, J.), and again in *Re Wilson*, [1940] Ch. 966 (Bennett, J.), it was held that the actuarial value of the annuity, and not the amount of the annuity fund, was the value of the annuity for purposes of abatement; and that X was entitled to be paid in full out of the sum so arrived at (abated as necessary with the pecuniary legacies) before Y was paid anything. Both Judges admitted that *Re Nicholson* was indistinguishable, but refused to follow that decision.

(3) In *Re Carew*, [1939] Ch. 794, the situation was slightly different, and Simonds, J., adopted yet another mode of valuation. There was a gift of residue on trust to pay two annuities of £500 a year each to A and B and after the death of each annuitant to hold the capital representing such yearly sum upon trust for such persons as the annuitant should appoint, with a gift over in default of appointment. It was held that the gift of the annuities and afterwards of the capital sum necessary to produce them must be construed as settled legacies of sums sufficient when invested in  $2\frac{1}{2}$  per cent. consols to produce £500 a year each; that the settled legacies must abate rateably with the other pecuniary legacies; and that A and B would only be entitled to receive such income as the abated sums actually produced.

In the conflict of authority between *Re Nicholson* on the one hand and *Re Farmer* and *Re Wilson* on the other, it is believed that until recently most conveyancers preferred the two latter decisions, possibly owing to a doubt as to whether the first case is accurately reported (the headnote is misleading and inaccurate; and see the remarks of Farwell, J., in *Re Farmer*). But now Uthwatt, J., in *Re Thomas* (1945), 62 T. L. R. 23, has followed *Re Nicholson* and refused to follow *Re Farmer* and *Re Wilson*. He pointed out that in those two cases no effect was given to the gift of the capital sum to Y after the death of the annuitant, and that the decisions postponed Y, not merely to the annuitant, but also to the other legatees. In this state of the authorities it is obvious that the only course open to executors is to seek the advice of the Court. It is very desirable that the conflict should be resolved by the Court of Appeal.

(Theobald 413.)

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*Conflict of laws—community property—doctrine of election.*—It is not surprising that *Re Allen's Estate* (1945), 173 L. T. 198, is an unsatisfactory decision, for the relevant authorities were apparently not cited. The question was one of election in the conflict of laws. The testator was domiciled at all material times in South Africa. He was married there

without an ante-nuptial contract. Accordingly by South African law all property belonging to him at the date of the marriage and subsequently acquired during the subsistence of the marriage became community property. If the wife survived the testator she was entitled under South African law to half the community property (after payment of all debts due by the joint estate), and the testator could only dispose of the other half.

The testator made his will in English form at a time when he was residing in England, but still domiciled in South Africa. The will was obviously prepared with the professional assistance of an English lawyer. The testator gave his wife (1) all his personal chattels and silver and plated articles and a pecuniary legacy; (2) all his real and immovable property in South Africa which he had power to dispose of; (3) a life interest in "the residue" of his property (after a trust for sale and conversion with power to postpone). The draftsman evidently thought that while the testator's immovables in South Africa would be subject to South African law, his movables in England would be subject to English law. He forgot that if the testator died domiciled in South Africa (which event happened) his movables wherever situate would be subject to the law of the domicile.

The question was whether the wife could take her half of the community property and also retain the benefit of the specific, pecuniary and residuary bequests under the will, or whether she was bound to elect between her rights under the South African law and her rights under the will. By South African law no case for election arose. But Cohen, J., decided that she was bound to elect for the following reasons:—

(i) The will was made in English form and therefore should be construed in accordance with English law and not in accordance with the law of the testator's domicile.

(ii) The trust for conversion showed that the testator intended to give his wife not merely his interest in the community property but the community property itself. He had purported to dispose of property which did not belong to him, and therefore the wife was put to her election.

With respect, we think the wife ought not to have been bound to elect, for the following reasons:—

(i) All text-writers on the Conflict of Laws agree that the question whether a beneficiary is bound to elect is governed by the law of the testator's domicile. Thus, Cheshire (*Private International Law*, 2nd ed., p. 557), says: "The rule of English Private International Law is now well settled, that where a testator dies possessed of property in more countries than one, the question whether a beneficiary is put to his election is governed by the law of the testator's domicile". To the same effect are *Dicey*, pp. 976—977; *Westlake*, s. 125; *Halsbury*, Vol. VI, p. 254; *Beale*, s. 306.5; and *Goodrich*, s. 163. It is true that the principle laid down by the text-writers has not been stated by the Judges with quite the same breadth and simplicity. But the significant fact is that in no reported case has a beneficiary been put to his election unless the testator was domiciled in some country the law of which adopts the doctrine of election or some analogous doctrine like the Scottish doctrine of approbate and reprobate. And the principle laid down by the text-writers was implicit in Younger, J.'s judgment in *Re Ogilvie*, [1918] 1 Ch. 492, 500. That case is the most recent English case on election in the conflict of laws and contains a full review of the authorities, but was not cited. In the instant case the testator's domicile was South African, and by South African law no case for election arose.

(ii) Counsel for the wife said they could not dispute the statement that "there is an exception to the general rule that disposition of personal

property (*sic*) follows the law of the domicile where it is clear from the will of the testator that the testator contemplated the application of some other law for the construction of his testamentary document". The learned Judge said he was "bound to hold" that this exception was established by *Re Price*, [1900] 1 Ch. 442, and *Re Simpson*, [1916] 1 Ch. 502. But both these cases were concerned with a pure question of construction, namely, whether a general bequest executes a general power of appointment. They are no authority for the much wider proposition that the essential validity of testamentary gifts is governed by the law intended by the testator. There is all the difference in the world between questions of construction and questions of essential validity. A French testator domiciled in France could not evade his obligation to leave a *legitima portio* to his children merely by drafting his will in English form. Nor could an English testator escape from the Inheritance (Family Provision) Act, 1938, by drafting his will in French form. The crucial question then is this: Is the English doctrine of election a rule of essential validity of wills or a mere rule of construction? In the former case the English doctrine should not apply to the will of a testator domiciled in South Africa, even if the will is drafted in English form; in the latter case it should. It is submitted that the former is the correct answer. No doubt it is necessary to answer questions of construction before it can be said that the foundations for applying the doctrine of election exist. But the doctrine itself is a rule of equity and not a mere rule of construction. "The doctrine does not depend on any supposed intention of the testator, but is based on a general principle of equity" (*Jarman on Wills*, 7th ed., p. 511). No one will quarrel with the learned Judge's decision that in this particular case the will should be construed according to English law because it was drafted in English form. But it does not follow that the English doctrine of election should apply if that doctrine is a rule of essential validity and not a mere rule of construction.

(iii) If the testator had been domiciled in England at the date of his death, the English doctrine of election would have been applicable. In that case no doubt the widow should have been bound to elect (on a basis of compensation) between the personal chattels and silver and plated articles, and her half of the community property. But even on the assumption that the English doctrine was applicable, the decision that the residuary gift also put the widow to her election seems surprising. It has been held again and again that in order to raise a case of election, it must be clear from the will that the testator purported to dispose of property that did not belong to him. "Where the testator has some interest in the property dealt with, the Court will lean as far as possible to a construction which would make him deal only with that to which he was entitled", *per* Page-Wood, V.-C., in *Howells v. Jenkins* (1862), 2 J. & H. 706, 713. "If the testator's expressions will admit of being restricted to property belonging to or disposable by him, the inference will be that he did not mean them to apply to that one over which he had no disposing power" (*Jarman*, p. 520; cf. *Minchin v. Gabbett*, [1896] 1 Ir. R. 1). Accordingly, if a testator makes a specific gift of something which he owned in common, for instance, "my freehold messuage now in the occupation of A", it is held that he intended to give the thing itself and not merely his interest in it. But if he makes a general gift of something which he owned in common, for instance, "my 4 per cent. stock" or "my real estate", still more if he makes a residuary gift, it is held that he intended to pass his partial interest only, and that no case for election arises. Thus, before 1834 a devise of "all my land" did not oblige the widow to elect between her dower and benefits under the will. This important distinction between specific and general gifts was neatly stated by Romilly, M.R., in *Miller v.*

*Thurgood* (1864), 33 Beav. 496, 499, as follows: "There are many cases on the subject, but they all resolve themselves into this: If a testator having an undivided share in a particular property devises that property specifically to his co-owner, a case of election arises and the devisee must elect between his own interest in the property and the interest he takes under the will. But if the testator does not dispose of it specifically, but by general words, such as 'all my lands and hereditaments' or the like, no case for election arises". Had counsel for the wife drawn the learned Judge's attention to these cases, it is submitted that the residuary gift would not have put the widow to her election.

(iv) The decision in the instant case is very difficult to reconcile with the well-known decision of the House of Lords in *De Nicols v. Curlier*, [1900] A. C. 21, which was not cited. In that case a man and woman domiciled in France were married there without an ante-nuptial contract. Accordingly, the French system of community property applied, with consequences which for present purposes were the same as under South African law. The husband acquired a domicile of choice in England and made a will in English form in which he gave his residuary estate to trustees on trust for sale and to pay the income to his wife for life and then upon trust for his daughter and her husband and children. The wife was not content with her life interest in residue: she contended that the will could only take effect on her husband's half of the community property and that the remaining half belonged to her absolutely by right of survivorship. The main question in the case was whether the French law continued to apply notwithstanding the husband's change of domicile. Kekewich, J., decided that it did and gave judgment for the widow. His judgment was reversed by the Court of Appeal but restored by the House of Lords. The significant point is that although the testator was domiciled in England, and therefore the English doctrine of election might have been applicable if it was relevant, it never occurred to any of the very eminent counsel and Judges in the case to suggest that the widow must elect between her rights under French law and her benefits under the will. The reason was obvious. As Kekewich, J., put it ([1898] 1 Ch. 413): "The testator must be considered as disposing only of that which was properly his, and the disposition did not include what would be the wife's under the law of community of goods".

To summarise the above criticisms, it is submitted that the English doctrine of election was inapplicable in *Re Allen's Estate* because the testator died domiciled in South Africa, and therefore the essential validity of his testamentary dispositions was a matter for South African law, and the doctrine of election is a rule of essential validity and not a mere rule of construction. Even if the doctrine of election was applicable, it was not relevant to the gift of residue, because the gift ought to have been limited to property which belonged absolutely to the testator, that is, to his half of the community property and not to the community property itself. If the testator had made a marriage settlement comprising specific property, his residuary gift would not have been deemed to include the settled property and would not have raised any case for election. The decision of the House of Lords in *De Nicols v. Curlier* shows that the result is the same even if the settled property is not specific, and even if the settlement is implied by law.

(Theobald 89, 90, 91.)

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*Gift of "all my plate"—whether plated articles included.*—In *Re Grimwood* (1915), 62 T. L. R. 40, Uthwatt, J., decided (not following

*Holden v. Ramsbottom* (1863), 4 Giff. 205) that a gift of "all my plate" was not limited to articles of silver and gold, but included articles of Sheffield plate and electro-plated articles as well. He held that the word "plate" has changed its meaning since 1863 and has now acquired a well-established secondary meaning. He intimated that he would decide about silver-mounted articles—which were not obviously plate—after seeing them or being given an adequate description of them. His decision will necessitate an alteration in the text-books on wills, but is not of much practical importance for conveyancers, because the Administration of Estates Act, 1925, the statutory will forms and the precedent books all define personal chattels so as to include plate and plated articles. (Theobald 175.)

### 3. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

*Rent Restrictions Acts—joint use of bathroom and lavatory—premises let as a separate dwelling.*—In *Cole v. Harris* (1945), 61 T. L. R. 440, the owner of a house (who herself occupied part of the house) let to the plaintiff the exclusive use of three rooms on the first floor together with the right to use, in common with the owner and another tenant, the bathroom and w.c. The plaintiff contended that the premises so let to him constituted a dwelling-house within the meaning of the Rent Restrictions Acts and claimed an apportionment of the standard rent.

The County Court Judge, applying what he took to be the principle laid down by the Court of Appeal in *Neale v. del Soto*, [1945] K. B. 144 (noted in the *Conveyancer*, Vol. 9, p. 154), held that as an essential part of the house was shared with other tenants the premises were not let as a separate dwelling within the meaning of the Rent Restrictions Acts.

The Court of Appeal distinguished the case, however, from *Neale v. del Soto*, and has now laid down a rule which, taken in conjunction with *Neale v. del Soto* (*Conveyancer*, Vol. 9, p. 154) and *Sharpe v. Nicholls* (1945), 61 T. L. R. 392 (see below), seems to differentiate clearly between a part of a house let as a separate dwelling and a mere sharing of a house. Morton, L.J., expressed the rule in these words: "I think the true test, where the tenant has the exclusive use of some rooms and shares certain accommodation with others, is as follows: there is a letting of part of a house as a separate dwelling, within the meaning of the relevant Acts if, and only if, the accommodation which is shared with others does not comprise any of the rooms which may fairly be described as 'living rooms' or 'dwelling rooms'. To my mind a kitchen is fairly described as a 'living room', and thus nobody who shares a kitchen can be said to be tenant of a part of a house let as a separate dwelling". He contrasted the case of a bathroom or w.c., which cannot be described as "living rooms" though essential according to present ideas.

MacKinnon, L.J., in agreeing with the formula suggested by Morton, L.J., said: "After all, a dwelling-house is that in which a person dwells or lives, and it seems reasonable that a separate dwelling should be one containing essential living rooms. A w.c. may be essential in modern days, but I do not think it is a living room, whereas a kitchen, I think, is".

Lawrence, L.J., dissented from the view taken by the majority of the Court. In his opinion, if any essential part of the house let is by the tenancy agreement to be shared, the premises are not let as a separate

dwelling. Even the sharing of a w.c. would by this construction of the Acts take the part of the house out of the Acts, for it would not be let as a separate dwelling. This would, if Lawrence, L.J.'s, view had been adopted by the rest of the Court, have been a sweeping decision, taking out of the Acts many flats and parts of houses hitherto regarded as controlled. As it is, the principle laid down by the majority judgment, though not so sweeping, presents a clear rule for future guidance. If living rooms are shared, then the part of a house is not let as a separate dwelling; if no living rooms are shared, though other accommodation is, then the premises are let as a separate dwelling. And for this purpose a kitchen is a living room, though bathrooms and w.c.s are not. In the majority of cases this rule will not present much difficulty in application; indeed, the specific ruling as to kitchens, bathrooms and w.c.s covers the very points likely to arise in the vast majority of these cases.

It is not to be assumed, of course, that the House of Lords will not in due course be asked to give a final ruling on this question, which is vital and goes to the very root and basis of Rent Act control. There are aspects of the question not developed in the Court of Appeal judgments, for example, the view suggested by the writer when commenting on the decision in *Neale v. del Soto* (the *Conveyancer*, Vol. 9, p. 154). Unless and until the question is taken to the highest tribunal, however, the Court of Appeal decision lays down a clear working rule which can be applied without difficulty to most cases.

A subsidiary, but interesting point which arose in *Cole v. Harris* consequent upon the decision that the premises were let as a separate dwelling, was the ruling of the Court of Appeal that the standard rent of the flat was to be determined not by apportionment but by the rent at which it was let on September 1, 1939, for the house of which it was part was not let as a separate dwelling either in 1939 or at the date of the hearing. Thus the Court of Appeal has avoided having to determine finally the question (on which doubts have been expressed) whether section 5 of the Act of 1938 applies to 1939 Act control.

(Rent Restrictions Guide, p. 18.)

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*Rent Restrictions Acts—tenancy of part of a house, sharing kitchen—claim by personal representatives for possession for personal occupation by one of them—whether “landlord” within paragraph (h) of First Schedule to Act of 1938.—Sharpe v. Nicholls (1945), 61 T. L. R. 392, raised two points of interest under the Rent Restrictions Acts.*

The first point is of special interest in view of the recent decisions in *Neal v. del Soto*, [1945] 1 K. B. 144, and *Cole v. Harris* (1945), 61 T. L. R. 440, commented on above.

The County Court Judge made an order for possession subject to the plaintiff allowing the defendant “a rent-protected tenancy of the front two rooms, together with joint use of kitchen and out-offices”. In fact, since the decision in *Neale v. del Soto*, a tenancy of such premises, with joint user of the kitchen, cannot be protected under the Rent Restrictions Acts, since it has been held that the subject-matter demised does not constitute a letting of part of a house as a separate dwelling within the meaning of the Acts. Although decided previously to *Cole v. Harris*, this decision is in accordance with the rule established by the latter case, and should be read in the light of the rule there laid down: since the letting involved the sharing of the kitchen, which is a living room, it cannot be the letting of a separate dwelling within the meaning of the Acts.

The second point raised in *Sharpe v. Nicholls* was one which was raised

for the first time in the argument in the Court of Appeal, and appeared to have been overlooked previously. The claim was under paragraph (h) of the First Schedule to the Act of 1933, *i.e.*, on the ground that the house was reasonably required by the landlord for occupation as a residence for himself, any son or daughter over eighteen years of age or his father or mother. A claim on this ground involves a comparison by the Court of the degree of personal hardship which the granting or withholding of an order will cause to the defendant and plaintiff respectively. But in this case the plaintiffs were joint personal representatives, and the case that was presented to the Court was that possession was wanted for personal occupation by one of them, the widow of the deceased. No evidence was given, however, as to the beneficial ownership of the cottage claimed, and it was not even established in Court whether the plaintiffs were executors under a will or what their title was. The County Court Judge appeared to have treated one of the plaintiffs, namely, the widow of the deceased, as landlord in her own right and judged the case on its merits accordingly.

The Court of Appeal were agreed that the County Court Judge had dealt with the case wrongly. MacKinnon and Lawrence, L.JJ., contented themselves with stating that in the absence of evidence that Mrs. S. (the plaintiff in question) was "the effective person interested in the house", no order could be made in her favour under paragraph (h). It would seem that in their view, provided there were evidence of the personal representative's beneficial interest in the property, such an order could then be made. Morton, L.J., went further, however, and laid down as his opinion the view that the expression "the landlord" as it is used in paragraph (h) of the First Schedule to the Act of 1933, cannot apply to one of several legal personal representatives. Morton, L.J., had considered the question whether the wide definition of the word "landlord" in section 12 (1) (g) of the Act of 1920 could be said to be imported into the Act of 1933, and expressed doubt on the point. He did not rely on this point, however, in enunciating the principle that personal representatives could not be "landlord" for the purposes of paragraph (h), and it seems to the writer that Morton, L.J.'s view must be the sound one here regardless of the exact limits of the application of the 1920 Act definition of "landlord". The paragraph envisages the requirement of possession for personal occupation by a physical landlord (or near relative as specified in the paragraph). When personal representatives sue as landlord they sue in a representative capacity, and in that capacity they cannot require occupation for themselves. They may desire possession so that one of their number can occupy in a personal capacity as beneficially entitled, but that is another matter. It may well be argued that the property needs to be vested in the person beneficially entitled before there is a landlord who can take advantage of paragraph (h). This, then, raises a further point of the date of acquisition by purchase, and the question of whether the word "purchase" means purchase for money or money's worth (the popular sense) or whether in a more technical sense it includes other persons who take otherwise than by descent. This is an intriguing subject which has not yet been fully explored.

(Rent Restrictions Guide, p. 56.)

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*Rent Restrictions Acts—cottage in vicarage grounds not within the Acts.*—In *Culverwell v. Larcombe* (1945), 61 T. L. R. 385, there was a letting of a cottage which was within the vicarage grounds and twenty yards from the vicarage itself. The incumbent had let it to the defendant, who was not at any time in the employment of the incumbent.

It was held by the Court of Appeal that as the cottage had been found

by the County Court Judge to be necessary for the convenient occupation of the vicarage within the meaning of section 59 of the Pluralities Act, 1838, it was to be treated as part of the parsonage house. Following *Gloucester (Bishop) v. Cunningham*, [1943] K. B. 101, the cottage, therefore, was outside the Rent Restrictions Acts.

(Rent Restrictions Guide, p. 74.)

*Rent Restrictions Acts—tenant occupying by virtue of employment dies—claim for possession against son under para. (g) of First Schedule to Act of 1933, son never having been employed by landlord.*—In *Bolsover Colliery Co. v. Abbott* (1945), 61 T. L. R. 514, a house was let to A by virtue of his employment. In due course A became a statutory tenant by holding over under the Rent Restrictions Acts after receiving a notice to quit. He remained in the employment of the landlord until his death in 1941, whereupon his son, the defendant, who was never in the employment of the landlord, took over the house and claimed to remain as statutory tenant under section 12 (1) (g) of the Act of 1920.

The landlord now required the house for occupation by a person in its full-time employment, and the question was whether an order for possession could be made under para. (g) of the First Schedule to the Act of 1933.

It was held unanimously by the Court of Appeal (Scott, MacKinnon and Lawrence, L.J.J.) that an order could be made, the word "tenant" in para. (g) including the original tenant to whom the house was let as well as the son who had now taken over.

(Rent Restrictions Guide, p. 55.)

*Rent Restrictions Acts—para. (h) of First Schedule to Act of 1933—"landlord who has become landlord by purchasing the dwelling-house".*—*Epps v. Rothnie* (1945), 61 T. L. R. 533, has settled an important point under para. (h) of the First Schedule to the Act of 1933, which in certain circumstances allows an order for possession to be made where the landlord requires the house for personal occupation.

That provision has no application to a landlord "who has become landlord by purchasing the dwelling-house after December 6, 1937" (or September 1, 1939, in the case of 1939 Act control).

In *Epps v. Rothnie* it has been held that only those landlords whose act of purchase itself made them landlords are caught by this exception—i.e., a landlord who buys the reversion upon a subsisting tenancy is caught by the exception and cannot make use of para. (h), but a person who buys the house with vacant possession after the specified date and then lets it is not affected by the exception and can proceed under para. (h). Such a person became landlord not by the act of purchase but by the subsequent letting.

(Rent Restrictions Guide, p. 56.)

*Rent Restrictions Acts—house reasonably required by landlord for occupation by employee—material date for determining whether so employed.*—In *Benninga (Mitcham) v. Bijatra* (1945), 61 T. L. R. 519, a house was let to a tenant in consequence of his employment by the landlord. That employment ceased in December, 1944. In February, 1945, the landlord entered into an agreement with S to employ him in the capacity in which the tenant had previously been employed, but owing to the need

for S to give notice and get released from his present employment he was not able to start work until April 16, 1945. In the meantime the ex-employee had remained in occupation as tenant and the landlord had accepted rent, but served notice to quit on February 24 and began an action for possession in the county court on March 20, 1945. The particulars of claim bore date March 15. The case was heard in the county court on May 2, 1945.

It was contended by the tenant (1) that he was in occupation under a new tenancy granted by the landlord (by his acceptance of rent) after the employment ceased; (2) that at the material time S was not engaged in the whole-time employment of the landlord, since he only began work on April 16; and (3) that the material time for both these considerations was the date of issue of the plaint, namely, March 20, 1945.

By para. (g) of the First Schedule to the Act of 1938, an order for possession may be made (where the Court considers it reasonable so to do) if the dwelling-house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment or in the whole-time employment of some tenant from him or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into, and either—

- (i) the tenant was in the employment of the landlord or a former landlord, and the dwelling-house was let to him in consequence of that employment and he has ceased to be in that employment; or
- (ii) the Court is satisfied by a certificate of the war agricultural executive committee that the person for whose occupation the dwelling-house is required is, or is to be, employed in certain categories of agricultural work.

Possession cannot be ordered under this paragraph of the Schedule if the fact is that a new contract of tenancy has been entered into with the ex-employee after his employment ceased: *Read v. Gordon*, [1941] 1 K. B. 495. But in *Read v. Gordon* rent was accepted for some six or seven years after the employment ceased, and that was a very different thing from accepting rent for several months while the landlord was seeking and then obtaining the release of a new employee from his existing employment. There was clearly no ground for inferring a new tenancy in such circumstances and accordingly the Court of Appeal rejected the contention that a new tenancy had been created.

It was then said that S did not become employed in the whole-time employment of the landlord until April 16, and that the material date on which such employment had to be shown to exist was March 20, the date of issue of the plaint. The Court of Appeal agreed as to the first of these contentions, holding that although he might have been "engaged" by the landlord some time previously, S was not "engaged in" his employment until he actually started work on April 16. It may be noted that there was no evidence in this case of a contract of employment having been entered into at any earlier date conditional upon housing accommodation being provided: that would have placed the matter, of course, on quite a different footing. But the material date for considering whether he was engaged in such employment or not was, in the view of the Court of Appeal, the date of the hearing in the county court. Since S was so engaged on that date, an order for possession was rightly made.

The case is an interesting illustration of para. (g), but has wider application. It is an illustration of a principle applicable to all cases where the Rent Restrictions Acts are raised as a defence. The words of MacKinnon, L.J., may be quoted to show the principle involved: "The Rent and Mortgage Interest Restrictions Acts do not forbid the bringing of an action; they only prohibit the granting of certain relief to which the

common law would entitle the claimant unless certain conditions have been fulfilled. The question whether those conditions exist must be determined when the question has to be decided whether the relief claimed may be granted—namely, at the hearing of the action". Another illustration of the same principle at work is the point that alternative accommodation, if relied on, must be shown to exist at the date of the hearing: *Nevile v. Hardy*, [1921] 1 Ch. 404. Contrast the point, involved in *Read v. Gordon*, that when relying on para. (g) the crucial time for determining whether the dwelling-house was let to the tenant in consequence of his employment is the date of the notice to quit: that of course does not mean that the crucial time for deciding all questions under the Acts is the date of the notice to quit.

(Rent Restrictions Guide, p. 55.)

*Rent Restrictions Acts—provision for deduction from rent for prompt payment—whether imported into statutory tenancy.*—The decision of the Court of Appeal in *Regional Properties v. Oxley* (sub nom. *Oxley v. Regional Properties, The Conveyancer*, Vol. 9, p. 92) has now been reversed by the House of Lords (61 T. L. R. 563) and *Bryanston Property Co. v. Edwards*, [1944] K. B. 32 (*The Conveyancer*, Vol. 8, p. 175) overruled on the question of what stipulations in the contract affecting the rent may be imported into the statutory tenancy under the Rent Restrictions Acts.

In *Regional Properties v. Oxley*, a dwelling-house, the standard rent of which was £90 a year, was let by an agreement at the yearly rent of £90 payable by equal monthly payments of £7 10s., with a proviso for deduction of 16s. 8d. each month that the tenant paid the landlord £6 13s. 4d. within fourteen days of the day on which the monthly payment of rent fell due. This contractual tenancy was determined by a notice increasing the rent to £92 1s. 6d. a year, being the amount of the standard rent plus permitted increases under the Rent and Mortgage Interest (Restrictions) Acts. The question was whether this could be done, or whether the proviso for deduction on prompt payment was by section 15 (1) of the Act of 1920 imported into the statutory tenancy which arose upon the determination of the contractual tenancy.

The Court of Appeal, following its earlier decision in *Bryanston Property Co. v. Edwards*, held that this proviso was imported into the statutory tenancy and that the tenant was still entitled to the benefit of it. A distinction was drawn between the reddendum (and the rent which was thereby reserved) and a separate clause of the agreement permitting the tenant under certain circumstances to make a deduction from his rent. The landlord could increase the rent reserved by the reddendum up to the maximum allowed under the Acts (*Phillips v. Copping*, [1935] 1 K. B. 15), but it was said that if there was such a distinct and separate clause permitting the tenant to make a deduction that clause was carried over into the statutory tenancy and the statutory tenant could still make the deduction.

The House of Lords has now swept away this fine distinction. The Act of 1920 provides, by section 15 (1), that the statutory tenant is entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act. The House of Lords has by a unanimous decision held that as the Acts fix a standard rent which is the maximum which may be charged (subject to permitted increases) and authorise the landlord to obtain a rent up to that amount (decided by *Phillips v. Copping*, [1935] 1 K. B. 15), any stipulation in the original contract of tenancy regulating in a different way the amount of rent payable is inconsistent with the provisions of the Act. Any

term which regulates the amount of rent payable is in fact part of the *reddendum* even though it is expressed in some other part of the document.

The principle laid down by the House of Lords is stated concisely by Lord Russell of Killowen in these words, "I think that the true question to ask oneself in a case like this is not whether the term is contained in a *reddendum*, but will the importation of this term into the statutory tenancy affect in any way the amount of the standard rent which the statute fixes? If it does it is not consistent with the provisions of the Act, and it is not within section 15 (1)". The same principle is expressed by Lord Macmillan as follows: "In my view, after an effective notice of increase of rent has been given all stipulations in the original contract of tenancy relating to the amount of rent payable are superseded and the statutory tenant must pay the rent which is stated in the notice, no more and no less".

It follows that *Bryanston Property Co. v. Edwards*, [1944] K. B. 32, is overruled on this question. The decision in *Capital and Counties Properties v. Butler*, [1944] K. B. 730, has not actually been affected, as the provision there for a reduced rent during hostilities was regarded as pure *reddendum* and nothing else and *Phillips v. Copping* was followed, allowing the landlord to increase the rent up to the standard rent by proper notice as soon as the contractual tenancy had been determined and a statutory tenancy under the Acts took its place. The *Capital and Counties Case* can, however, be put on a wider footing now that the *Bryanston Case* has been overruled, for the decision would now be the same whether the provision for a reduced rent during hostilities were part of the *reddendum* purely or expressed in a separate clause of the agreement.

It is important to observe that that part of the decision in *Bryanston Property Co. v. Edwards* which decided that the rent there reserved amounted to a progressive rent within section 12 (1) of the Act of 1920, since the contract which fixed the standard rent provided for an automatic increase three months after the end of the war with Germany, has not been affected by the House of Lords decision in *Regional Properties v. Oxley*. That part of the case still stands as an authority on what is a progressive rent under the Acts, and has been followed in the later case of *Tedman v. Whicker*, [1944] K. B. 112. This point might have been made clearer in certain reports of the *Regional Properties Case*, which refer simply to the *Bryanston Case* as "overruled."

(Rent Restrictions Guide, pp. 34, 62.)

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*Liabilities (War-Time Adjustment) Acts*—actions for the recovery of land stayed by the protection order, but county court has no power to extend debtor's occupation of land beyond the end of his tenancy.—In the recent case of *Re Alsop* (1945), 61 T. L. R. 408, a debtor who had fallen into arrears with his rent was given notice to quit but refused to give up possession, thus becoming a trespasser; he was not protected by either the Rent Restrictions Acts or the Courts (Emergency Powers) Acts. The landlord issued a writ claiming recovery of possession, arrears of rent and mesne profits, but before trial the debtor applied to the County Court Judge for a protection order under the Liabilities (War-Time Adjustment) Act, 1941, s. 3 (2). The Judge made a protection order and stayed the action, allowing the debtor to remain in possession on certain terms.

It was held by the Court of Appeal, in a unanimous judgment of the Court read by Morton, L.J., that by section 3 (2) (a) of the Act of 1941 all actions for the recovery of land are stayed, as a temporary measure, when the Court makes a protection order, whether or not such actions are based on non-payment of rent, notwithstanding an *obiter dictum* of

Goddard, L.J., in *Re Affairs of Kirby*, [1944] 1 K. B. 213, to the effect that only actions for the recovery of possession of land for non-payment of rent are stayed.

That does not mean, however, that the action must remain stayed. It was decided in *Kirby's Case*, and is now confirmed by *Alsop's Case*, that the County Court Judge, when making an adjustment order under the Liabilities (War-Time Adjustment) Acts, has no jurisdiction to extend the debtor's occupation of property beyond the term of his lease. Where, as in *Alsop's Case*, the debtor is holding over as a trespasser, the action for possession must be allowed to proceed.

The question was considered whether the position had been in any way altered since *Kirby's Case* by the provisions of the Liabilities (War-Time Adjustment) Act, 1944. That Act amends the provisions of the Act of 1941 enabling a tenant to be wholly or partly relieved from the payment of rent in respect of any specified period, and allows the Court to provide also in the adjustment order for the postponement of payment of rent (see section 6 of the Act of 1944); and by the definition section (section 21) "tenant" includes a person retaining possession of any premises after the termination of a lease or tenancy. On this definition of the word "tenant" an argument was founded that a person who retained possession of premises as a trespasser was within the definition and that the Court was thereby given a power to extend a debtor's occupation of property beyond the end of his tenancy. This contention was rejected by the Court of Appeal, who considered that if it had been intended to confer a power so remarkable this would have been done in plain terms. The definition of "tenant" was therefore read as including only persons *lawfully* retaining possession of any premises after the determination of a lease or tenancy (*e.g.*, under the Rent Restrictions Acts), and the decision in *Kirby's Case* still stands.

(Woodfall Supplement No. 4, pp. 59, 92, 95.)

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#### 4. INCOME TAX CASES.

By LEONARD STEIN, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

*Income tax—tax-free annuity—annuitant's liability to account for reliefs and allowances.*—*Re Williams*, [1945] Taxation Reports 209, is an addition to the lengthening series of cases relating to the application of the well-known rule in *Re Pettit*, [1922] 2 Ch. 765, as to the liability of a person in enjoyment of a tax-free annuity to account to the trustees for an appropriate proportion of his reliefs and allowances. In *Re Williams* the will provided that the annuity should be paid "free of all deductions whatsoever and free from income tax at the current rate for the time being deductible at source". Having regard to the language used by the testator, and to the tests laid down by the authorities, including in particular *Re Eves*, [1939] Ch. 969, Uthwatt, J., felt obliged to hold that the bequest must take effect on the footing that the annuitant must account to the trustees in accordance with the rule in *Pettit's Case*. The learned Judge reached this conclusion with evident reluctance and made it clear that he had his doubts as to whether *Re Pettit* had been rightly decided.

*Tax-free annuity—will made before and codicil made after September 3, 1939—Finance Act, 1941, s. 25.*—In *Re Sebag Montefiore*, [1944] Ch. 331 (see *The Conveyancer*, Vol. 9, at p. 53) a tax-free annuity of £300 was bequeathed by a will made before September 3, 1939, and was "increased to £400" by a codicil made after that date. It was held in the Court of Appeal that the provision for the payment of the entire amount of £400 had not been made by the codicil, nor had the codicil effected a "variation", in the relevant sense, of the provision made by the will for the £300 annuity, with the result that only the additional £100 was outside the operation of section 25 of the Finance Act, 1941, the original annuity of £300 being reducible, as provided by that section, to twenty twenty-ninths of the stated amount. A similar question arose in *Re Dixon*, [1945] W. N. 140, where, however, a verbal distinction led to a different result. A will made before September 3, 1939, provided for the payment of a tax-free annuity of £78. By a codicil made after that date the testatrix directed that the will should be construed and have effect as if £104 had been inserted in place of £78. Vaisey, J., distinguished *Re Sebag Montefiore*, above, on the ground that in that case there was a bequest of an annuity of £300, increased by the codicil to £400, whereas here the testatrix had not, in terms, "increased" the original annuity, but had directed that a larger annuity should be substituted for that originally bequeathed. While recognising that the difference was of a purely formal character, the learned Judge, in applying the decision in *Re Sebag Montefiore* as he understood it, felt bound to hold that the distinction was sufficient to turn the scale, and that the effect of the substitution clause in the codicil was to put an end to the original annuity, replacing it by a fresh annuity of a larger amount. It followed that the provision for the entire amount of £104 was made after September 3, 1939, and that, accordingly, section 25 of the Finance Act, 1941, did not apply to any part of that amount.

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*Income tax—judgment debt including award of interest—deduction of tax.*—Evershed, J.'s decision in *Westminster Bank v. Riches* (see *The Conveyancer*, Vol. 9, at p. 237), has been affirmed by the Court of Appeal, leave being given to appeal to the House of Lords: [1945] Taxation Reports 217. The question at issue was whether tax was deductible from interest awarded, under section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, to a plaintiff who had successfully sued for the recovery of a sum of money representing his share of the profit arising out of a transaction effected some years earlier. Evershed, J., held, and the Court of Appeal unanimously agreed, that on payment of the judgment debt tax was deductible from so much of it as represented the award of interest. *du Parcq, L.J.*, referred in his judgment to a case decided last year by Cassels, J.: *Regal (Hastings), Ltd. v. Gulliver*. This decision was not reported at the time, but a report has now appeared in [1945] Taxation Reports 205. The case was one in which a company had successfully sued certain former directors for the recovery of a profit made by them on sales of shares in such circumstances as to debar them from retaining the benefit of the transactions for themselves. The defendants were ordered to pay over to the company the amount of the profit, with interest at 4 per cent. from various dates. The learned Judge held that the amount ordered to be paid as interest was interest in the income tax sense, and that so much of the judgment debt as represented interest was payable under deduction of tax. He held, further, that the interest, though payable in a lump sum, must be regarded as yearly interest, since the purpose of the judgment was to place the company in the same position as though the principal sum

had been paid over by the defendants when it ought to have been paid over and had thereafter yielded interest year by year. As to the rate at which tax was deductible, it was necessary to consider the application in this case of the words "the standard rate for the year in which the amount payable becomes due" in rule 19 of the General Rules, as altered by section 39 (1) of the Finance Act, 1927. It was contended, on behalf of the company, that the deduction ought to be related to the various rates in force for the years intervening between the carrying out of the impugned transactions and the date of the judgment. Reliance was placed on *Re Sebright*, [1944] 2 A. E. R. 547, where, in applying rule 19 in a case relating to the payment of accumulated arrears of an annuity, Vaisey, J., held that the amount of tax to be deducted must be computed on the principle that the annuitant was to be placed in the same position as though the annuity had been punctually paid, year by year, at the moment when it became due. Cassels, J., distinguished this decision on the ground that the case before him was not one in which accumulated arrears of interest were being paid off; the interest became payable because it was so ordered by the Court, and, for the purposes of rule 19, it could not be said to have become due until the date of the order. Tax was, therefore, deductible at the rate in force for the year in which the order was made.

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*Income tax—charity—whether public trust for benefit of the community—Income Tax Act, 1918, s. 37.*—In *Trustees of Sir Howell Jones Williams Trust v. C. I. R.* (1945), 24 A. T. C. 91, a testator by his will devised certain property to trustees upon trust to use it "for the purpose of establishing and maintaining an Institute . . . for the benefit of Welsh people resident in or near or visiting London with a view to creating a centre in London for promoting the moral, social, spiritual and educational welfare of Welsh people. . . ." It was further provided in the trust-deed that the premises of the Institute might be used for various specified purposes, including the provision of "a meeting place for Welsh people in London and their friends, where they can obtain facilities for social intercourse, study, reading, rest, recreation and refreshment". The expression "Welsh people" was defined in the deed as including persons "born or educated or at any time domiciled in the Principality of Wales or the County of Monmouth".

The Special Commissioners, after hearing evidence as to the activities of the Institute, came to the conclusion that "while certain of its features conform to the idea of a charity, . . . these features are not so dominant nor is the general character of the Institute such as effectively to distinguish it from an ordinary social club". The trustees failed before Macnaghten, J., in an appeal against a disallowance of their claim to exemption from tax under section 37 of the Income Tax Act, 1918. The Court of Appeal unanimously affirmed the decision of Macnaghten, J., but gave leave to appeal to the House of Lords. The question mainly considered in the Court of Appeal was whether the property was vested in the trustees for charitable purposes, for, if not, the question whether the income was applied for charitable purposes only did not arise. Apart from other considerations, the Court of Appeal took the view that the trust was not a charitable trust because the class of the community constituting the beneficiaries was not sufficiently defined. As Lawrence, L.J., put it, "there is really no common quality which unites the potential beneficiaries into a class except a vague connection with Wales". A trust for the benefit of persons, or some clearly distinguishable group of persons, resident in a specified locality may be a good charitable trust as

being a trust for the benefit of an easily identifiable section of the public, but this—it was held—was not a description which could be applied to “Welsh people” as defined by the trust-deed in the present case. “It is scarcely possible”, said Lawrence, L.J., “to imagine a class more vague and ill defined”, and the other members of the Court concurred in the view that the impossibility of finding an identifiable class of beneficiaries was of itself sufficient to require the appeal to be dismissed. In view of the facts stated by the Special Commissioners, the appeal might well have failed on the ground that, in any case, the trust income had not been applied for charitable purposes only, but the main interest of the judgments lies in the discussion of the tests to be applied in deciding whether a trust has such a public character as to be capable of constituting a charitable trust in the legal sense.

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*Income tax—trustees’ remuneration—Income Tax Act, 1918, All Schedules Rules, Rule 19.—Hearn v. Morgan and Pritchard v. Lathom-Browne*, [1945] Tax Leaflet 1340, which, turned on the familiar provisions of rule 19 of the All Schedules Rules, raised a short point, on which the Court had little difficulty in deciding in favour of the taxpayer. One of the trustees of a marriage settlement had been appointed by an order of the Court, which provided that he should out of the income of the trust estate receive, by way of remuneration, a certain annual sum free of tax. Another trustee had been appointed by the settlor’s widow, in exercise of a power conferred upon her by the settlement. In making the appointment, she had covenanted to pay him, by way of remuneration, such an annual sum as, after deduction of tax at the standard rate, would leave a stated amount, and had directed the trustees to make payments accordingly out of the income of the trust estate. For some unexplained reason, what was actually paid to each of these persons for a number of years was not the stated amount, but a sum equal to that amount grossed to tax at the standard rate. On that sum the Revenue authorities sought to charge them with tax by direct assessment. They resisted on the ground that the payments in question were annual payments within the scope of rule 19, and that that rule expressly provides that, in the case of payments to which it applies, “no assessment shall be made upon the person entitled to such . . . annual payment”. It was held by Macnaghten, J., that this contention was correct and that the Appeal Commissioners had come to the right conclusion in discharging the assessments. An attempt by the Revenue authorities to assess a trustee under Case II of Schedule D on an annual payment received by him from the trust estate by way of remuneration failed in *Baxendale v. Murphy* (1924), 9 T. C. 76, where it was held that rule 19 applied and there could be no question of the remuneration being taxable as a payment arising from an employment. In the cases here under notice it was argued that, so far as the trustee appointed by an order of the Court was concerned, *Baxendale v. Murphy*, above, was distinguishable, in that there the remuneration was derived directly from the bounty of the settlor. The learned Judge held that the distinction was immaterial and that the position was the same as it would have been if the provision for the remuneration had been made in the settlement.

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*Surtax—investment company—non-member of company treated as member—whether apportionment appropriate—Finance Act, 1939, s. 15.—*It is not necessary to set forth in detail the somewhat complicated facts in *Chamberlain v. C. I. R.* and *Talbot Investment Co. v. C. I. R.*, [1945]

Tax Leaflet 1339, in order to bring out the main points decided by the Court of Appeal in affirming the judgment of Macnaghten, J., in favour of the Crown. The whole income of an investment company for certain years of assessment had been apportioned, under the companies surtax legislation, to an individual who was not a member of the company but had been treated as a member by virtue of section 15 of the Finance Act, 1939. That section enables a non-member to be treated as a member if he "is, or is likely to be, able to secure that income or assets . . . of the company will be applied either directly or indirectly for his benefit". An individual is to be deemed to satisfy this description "if he is in fact able so to do by any means whatsoever, whether he has any rights at law or in equity in that behalf or not". References to an individual are to be deemed to include the wife or husband of that individual. The Special Commissioners are given power to apportion to the individual who is treated as a member "such part of the income of the company as appears to them to be appropriate and may adjust the apportionment of the remainder of the company's income as they may consider necessary". In *Chamberlain's Case*, above, the main points calling for notice are those relating to the question of apportionment. It was contended for the appellants that the apportionment of the whole income to Mr. Chamberlain must be wrong because such an apportionment would be inconsistent with the implications of the expressions "such part of the income of the company . . ." and "the remainder of the company's income. . . ." On this verbal point it was held that the words "such part of the income" must be read as meaning "such part—it may be the whole . . .", and the words "the remainder" as "the remainder, if any". A more substantial argument was that the Special Commissioners had erred in attaching no weight to the circumstance that the company had, in fact, paid dividends which had not reached, and could not reach, either Mr. Chamberlain or his wife. These dividends once declared, it was impossible for Mr. Chamberlain to secure the application of the whole of the company's income for the years in question for his own or his wife's benefit. But this, it was held, was immaterial, the question being, not what had, in fact, been done with the income, but whether Mr. Chamberlain had been in a position to direct it into his own pocket or his wife's. "The existence of the ability, not its exercise, is the test". Accordingly, the fact that dividends had been paid out of the income to persons other than Mr. Chamberlain or his wife in no way precluded the Special Commissioners from apportioning the whole of the income to Mr. Chamberlain. In what circumstances, if any, other than error in law, it is open to the Court to consider whether an apportionment by the Special Commissioners is "appropriate" was a question which it was unnecessary to decide, since in this case the Court was satisfied that the apportionment was appropriate.

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*Surtax—privately controlled investment company—control of company relinquished during year of assessment—Finance Act, 1939, s. 15.*—In *Fendoch Investment Trust Co. v. C. I. R.*, [1945] Tax Leaflet 1337, the House of Lords has decided some important questions as to the application of sections 14 and 15 of the Finance Act, 1939, which form part of the companies surtax legislation and provide for the automatic apportionment of the income of privately controlled investment companies. The Special Commissioners are, by sub-section (2) of section 15, given power to apportion such part of the income of the company as appears to them to be appropriate to various classes of persons, including "any person who is a member of the company and in their opinion is, or is likely to be, able to secure that income or assets of the company . . . will be applied . . .

for his benefit to a greater extent than the value for apportionment purposes of his relevant interests in the company, considered in relation to the value for those purposes of the relevant interests of other persons therein". These provisions apply retrospectively to the year of assessment 1938-39. In the *Fendoch Case*, above, it was clear and was not contested that throughout 1938-39 the capital structure and voting rights were so arranged that Mrs. M., though the holder of a minority of the share capital, was, in fact, in a position to cause the whole of the company's income to be distributed by way of dividend to herself. This state of affairs continued until December 8, 1939, when the company was reorganised, with the result that from that date to the end of the year of assessment 1939-40 Mrs. M., though still a member, was no longer in a position to control the distribution of dividends. Nevertheless, the Special Commissioners apportioned to Mrs. M. the whole of the company's income, not only for 1938-39, but also for 1939-40. It was contended on behalf of the appellants that, so far as 1939-40 was concerned, the apportionment was invalid, since the point of time to be looked at was the last day of the year of assessment, and on April 5, 1940, Mrs. M.'s control, on which the apportionment was based, no longer existed. In the alternative, it was contended that in any case the Special Commissioners were bound to give weight to the fact that Mrs. M. was in control for a part only of the year of assessment and were, therefore, entitled, at the most, to apportion to her a rateable part of the company's income for that year. Both these contentions failed in the House of Lords, as they had failed in the Courts below and before the Appeal Commissioners. As to the first point, it was held that there was nothing in the relevant legislation which required that the facts on which an apportionment was based should be in existence on the last day of the year of assessment in question. An apportionment could be made under section 15, above, to any person of whom it could be predicated, at any time in the year of assessment, that he satisfied the relevant conditions. As to the question of *quantum*, it was held that the Special Commissioners' discretion was intended to be "unfettered and absolute", and that an apportionment made without any allowance for the relinquishment of control in the course of the year of assessment did not constitute such an improper exercise of the discretion as would warrant the interference of the Court.

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*Income tax—tax-free annuity—annuitant's claim for repayment of tax—Income Tax Act, 1918, All Schedules Rules, Rule 19.*—The difficulties presented by the rules relating to deduction of tax at the source in their application to tax-free annuities are exemplified by *Cook v. C. I. R.*, [1945] 2 A. E. R. 377, in which the decision of the Court of Session (see *The Conveyancer*, Vol. 9, p. 52), has now been affirmed by the House of Lords. The facts are very simple. C was entitled under a will to an annuity of £100 "free of all deductions including income tax and Government duty". She had no other income. The trustees duly paid her £100 a year. For the year of assessment 1939-40 she claimed repayment of tax in the amount of £47 11s. 4d., representing the personal allowance and reduced rate relief to which she was entitled on the footing that her income was £100 grossed to tax at the then standard rate of 7s., i.e., £153 16s. 11d. The repayment claim was refused by the Revenue authorities on the ground (it would seem) that the tax-free annuity of £100 was an annuity of such amount as, after deducting the tax actually payable by that particular annuitant for the year in question, would leave £100; that, since C had no income other than the annuity, and £100 was below the exemption limit, a payment of £100 would, in her case, leave £100 in her pocket; that, she had, in fact,

received £100; and that it followed that, having suffered no tax, she was entitled to no repayment. By a majority of three to two (Lords Russell and Simonds dissenting), the House of Lords decided against the Crown. It was pointed out that in order to provide £100 for C, the trustees had had to set aside out of the income of the trust estate £153 16s. 11d., of which £53 6s. 11d. represented tax paid by deduction. The £53 6s. 11d. must be treated as having been paid on behalf of C, and accordingly C—it was held—was entitled to repayment of the amount by which £53 6s. 11d. exceeded the tax for which she was truly liable. At this point, however, the reasoning departed from that of the Court of Session. It was there held that the tax-free annuity of £100 must be treated as representing, in the hands of C, a gross income of £153 6s. 11d., with the result that the repayment due was the amount claimed, *viz.*, £47 11s. 4d. In the House of Lords, on the other hand, the view taken by the majority was that C's income was not £153 6s. 11d., but £100 and no more. No tax was payable on an income of £100, but through the operation of the statutory machinery for deduction of tax at the source, tax in the amount of £53 6s. 11d. had, nevertheless, had to be paid by the trustees on C's behalf. Accordingly, though C had claimed only £47 11s. 4d., this claim was made on an incorrect basis, and she was really entitled to repayment of the whole £53 6s. 11d. It was agreed on all hands that the rule in *Pettit's Case*, [1922] 2 Ch. 765, was applicable, with the result that tax recovered by C would be payable over by her to the trustees, but this was dismissed as immaterial in deciding whether her claim should be admitted.

### 5. DEATH DUTY CASES.

*Estate duty—interest reserved by settlor—Finance Act, 1894, s. 2*  
 (1) (c).—*Re Cochrane*, in which Uthwatt, J.'s decision in favour of the Crown was affirmed by the Court of Appeal ([1945] Taxation Reports 87), was concerned with a claim to estate duty under section 2 (1) (c) of the Finance Act, 1894, arising out of an unusual provision in a marriage settlement. The whole of the settled property had been brought in by the husband. The income of the trust fund was made payable to the wife during her life, and the settlement proceeded to make provision in the usual manner for the husband and children. Then came the following clause:—

“It is also agreed and declared that the income . . . to be paid to the said [wife] during her life shall be expended by her in current household expenses and management”.

On the strength of this clause, the Crown contended that, on the death of the husband survived by his wife, the settled property must be deemed to pass by virtue of section 2 (1) (c), above, as property passing under a settlement “whereby an interest in such property . . . for life, or any other period determinable by reference to death, is reserved . . . to the settlor”. It was indisputable that the clause in question relieved the husband, *pro tanto*, of a liability—*viz.*, the liability to pay “current household expenses and management”. This, it was held, was amply sufficient to give him an interest in the relevant sense, it being borne in mind that the word “interest” in this context is to be widely construed—see *Tennant v. Lord Advocate*, [1939] A. C. 207, and *Att.-Gen. v. Farrell*, [1931] 1 K. B. 81. The interest here was, it is true, only an interest in the income of the property, but the Court of Appeal agreed with Uthwatt, J., in holding

that an interest in the income of property is, for this purpose, an interest in the property. But was the interest here an interest for life or for a period determinable by reference to death—i.e., the settlor's life or death—for the words "life" and "death" must be taken to refer to the settlor? If the husband had survived the wife, then the interest reserved by the clause in question would have ceased on the death of the wife while the husband was still living. But the settlement provided that, on the death of the wife survived by the husband, the income of the trust fund should become payable to the husband during his life. Hence, the husband would still have an interest in the income, and, though it would have been changed into an ordinary life interest, this—it was held—was immaterial. Thus, whether the husband or the wife died first, the effect of the provisions of the settlement as a whole was that in either event an interest was reserved to the settlor for life. But there was one more question to be considered. Had the husband surrendered his interest so as to make it necessary to consider the applicability of section 59 (3) of the Finance (1909-10) Act, 1910, as amended by section 43 of the Finance Act, 1940? There was evidence to the effect that for many years before the husband's death the wife had not been required to spend the income on household expenses and managment and had, in fact, used it to satisfy her own personal requirements. There had, however, been no formal release or abandonment by the husband of his rights, and there was nothing to show that he had done more than acquiesce in the wife's use of the income without surrendering his right to object. That being so, there could be no room for the application of section 59 of the 1910 Act (as amended), and it followed, for the reasons already stated, that the property must be deemed to pass on the husband's death.

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